CORRECTED COPY

80-1345
No.

Office-Supreme Court, U.S.
FILED
FEB 10 1981
ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT A. HAMMOND, III
A. DOUGLAS MELAMED *
LYNN BREGMAN
JOSEPH A. GRUNDFEST

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioner
Kaiser Steel Corporation

Of Counsel:

RICHARD GARY
General Counsel
Kaiser Steel Corporation
300 Lakeside Drive
Oakland, California 94666

February 10, 1981

* *Counsel of Record*

QUESTIONS PRESENTED

1. Whether a party to a contract provision, which he believes violates federal antitrust and labor laws and which for years no one had attempted to enforce, may raise the defense of illegality in an action brought for specific performance of the allegedly illegal provision.

2. Whether the Labor-Management Relations Act, which in Section 8(e) provides that certain types of contract clauses are "unenforcible and void," is properly construed as both granting federal court jurisdiction to enforce collective bargaining agreements and precluding federal courts from deciding whether the clauses they are called upon to enforce violate Section 8(e).*

3. Whether the Employee Retirement Income Security Act of 1974 authorizes a federal court to award attorneys' fees to a plaintiff in an action brought to enforce a collective bargaining agreement when the plaintiff did not allege a violation of ERISA or of any pension or welfare plan subject to ERISA and when Section 301 of the Labor-Management Relations Act, which expressly provides federal court jurisdiction in actions to enforce col-

---

* Because this proceeding draws into question the constitutionality of the Labor-Management Relations Act, 29 U.S.C. §§ 158(e), 185 (1976), as construed by the court of appeals, and neither the United States nor any department, office, agency, officer or employee thereof is a party, 28 U.S.C. § 2403(a) may apply, and this petition has been served upon the Solicitor General. No court of the United States as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General that the constitutionality of the Labor-Management Relations Act has been drawn into question.

lective bargaining agreements, does not authorize an award of attorneys' fees.**

** The following were parties to the proceedings in the court of appeals: Kaiser Steel Corporation (appellant) and Julius Mullins, John J. O'Connell, and Paul R. Dean, in their capacities as trustees of the United Mine Workers of America Health and Retirement Funds (appellees). Harrison Combs has since replaced Julius Mullins as a trustee.

The Henry J. Kaiser Family Foundation has a 17.1% ownership interest in Kaiser Steel Corporation. Kaiser Steel Corporation has no other parent corporation or affiliate and no partially owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I. THE COURT OF APPEALS' UNPRECEDENTED DECISION ABOLISHING THE DEFENSE OF ILLEGALITY IN CONTRACT ENFORCEMENT ACTIONS RAISES IMPORTANT QUESTIONS OF FEDERAL LAW AND POLICY AND IS CONTRARY TO DECISIONS OF THIS COURT	6
A. The Court of Appeals Ignored Important Congressional Policies by Ordering Conduct That Is Proscribed by the LMRA and the Sherman Act	7
B. The Court of Appeals' Sweeping Decision Will Eliminate the Defense of Illegality and Have a Significant and Widespread Impact on Future Cases in Which Parties Seek Judicial Aid in Enforcing Unlawful Contracts	10
II. THE COURT OF APPEALS' HOLDING THAT FEDERAL COURTS HAVE NO JURISDICTION TO DECIDE WHETHER CONTRACT CLAUSES THEY ARE ASKED TO ENFORCE VIOLATE SECTION 8(e) OF THE LMRA IS ERRONEOUS AND CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS	14

TABLE OF CONTENTS—Continued

Page

A. The Court of Appeals Has Misunderstood Section 8(e) and the Prior Decisions of This Court 15

B. As Construed by the Court of Appeals, the LMRA Would Unconstitutionally Intrude Upon the Ability of the Federal Courts To Decide Contract Enforcement Actions 20

C. The Court of Appeals' Decision Conflicts with Decisions of at Least Two Other Circuit Courts 23

III. THE COURT OF APPEALS' DECISION AFFIRMING THE AWARD OF ATTORNEYS' FEES STRETCHES ERISA JURISDICTION FAR BEYOND CONGRESS' INTENT, FLOUTS THIS COURT'S DECISION IN *ALYESKA*, AND PROMISES TO STIMULATE PENSION AND ATTORNEYS' FEES LITIGATION IN THE FEDERAL COURTS.... 25

CONCLUSION 29

TABLE OF AUTHORITIES

CASES: Page

Alyeska Pipeline Co. v. *Wilderness Society*, 421 U.S. 240 (1975) 25
Amax Coal Co. v. *NLRB*, 614 F.2d 872 (3d Cir. 1980), *cert. granted*, 49 U.S.L.W. 3515 (1981) .. 27
Associated Builders and Contractors v. *Irving*, 610 F.2d 1221 (4th Cir. 1979), *cert. denied*, 100 S.Ct. 2941 (1980) 21
Associated Press v. *Taft-Ingalls Corp.*, 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965) 12
Atkinson v. *Sinclair Refining Co.*, 370 U.S. 238 (1962) 19
Bell v. *Hood*, 327 U.S. 678 (1946) 27
Big Top Stores, Inc. v. *Ardsley Toy Shoppe, Ltd.*, 64 Misc. 2d 894, 315 N.Y.S.2d 897 (Sup. Ct. 1970), *aff'd*, 36 A.D.2d 582, 318 N.Y.S.2d 924 (App. Div. 1971) 19
Boatland, Inc. v. *Brunswick Corp.*, 558 F.2d 818 (6th Cir. 1977) 17
Botany Industries, Inc. v. *Clothing Workers*, 375 F. Supp. 485 (S.D.N.Y.), *vacated as moot*, 506 F.2d 1246 (2d Cir. 1974) 23
Bugher v. *Frash*, 98 L.R.R.M. 3010 (S.D. Ind. 1977) 27-28
Bugher v. *Southland Fabricators and Erectors, Inc.*, 452 F. Supp. 870 (W.D. La. 1978) 27
Carpa, Inc. v. *Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976) 9
Carrier Air Conditioning Co. v. *NLRB*, 547 F.2d 1178 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977) 23
Cate v. *Blue Cross & Blue Shield*, 434 F. Supp. 1187 (E.D. Tenn. 1977) 27, 28
Cecil B. DeMille Productions v. *Woolery*, 61 F.2d 45 (9th Cir. 1932) 13
Charles Dowd Box Co. v. *Courtney*, 368 U.S. 502 (1962) 20
Combs v. *Kaiser Steel Corp.*, No. 80-2545 (Oct. 6, 1980) 3

TABLE OF AUTHORITIES—Continued

Page

Connell Construction Co. v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975) 18, 19
Continental Wall Paper Co. v. *Louis Voight & Sons Co.*, 212 U.S. 227 (1909) 11
Cowan v. *Keystone Employee Profit Sharing Fund*, 586 F.2d 888 (1st Cir. 1978) 27
De Magno v. *United States*, No. 79-1852 (D.C. Cir. Sept. 24, 1980) 19, 22
Doherty v. *Bartlett*, 81 F.2d 920 (1st Cir.), *cert. denied*, 298 U.S. 676 (1936) 13
Eiberger v. *Sony Corp.*, 459 F. Supp. 1276 (S.D. N.Y. 1978), *aff'd*, 622 F.2d 1068 (2d Cir. 1980) .. 11, 12
Farbenfabriken Bayer A.G. v. *Sterling Drug, Inc.*, 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963) 10, 12
Fase v. *Seafarers Welfare and Pension Plan*, 79 F.R.D. 363 (S.D.N.Y. 1978) 27
General Telephone Co. v. *International Brotherhood of Electrical Workers Local 89*, 554 F.2d 985 (9th Cir. 1977) 25
Gibbs v. *Consolidated Gas Co.*, 130 U.S. 396 (1889) 6
Huge v. *Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979) 12, 24
Huge v. *Maximeadows Mining Co.*, 459 F. Supp. 267 (N.D. Ala. 1978) 27
Huge v. *Overly*, 445 F. Supp. 946 (W.D. Pa. 1978) 27
Huge v. *Reid*, 468 F. Supp. 1024 (N.D. Ala. 1979), *aff'd mem.*, 615 F.2d 916 (5th Cir. 1980) 27
Hurd v. *Hodge*, 334 U.S. 24 (1948) 23
IAM National Pension Fund v. *Ward La France Truck Corp.*, No. 77-1206 (D.D.C. Feb. 1, 1978) 27
Inter-Continental Promotions, Inc. v. *Miami Beach First National Bank*, 441 F.2d 1356 (5th Cir.), *cert. denied*, 404 U.S. 850 (1971) 13

TABLE OF AUTHORITIES—Continued

Page

International Brotherhood of Electrical Workers Local 12 v. *A-1 Electric Service, Inc.*, 535 F.2d 1 (10th Cir. 1976), *cert. denied*, 429 U.S. 832 (1976) 26
International Brotherhood of Teamsters v. *Daniel*, 439 U.S. 551 (1979) 27
Kelly v. *Kosuga*, 358 U.S. 516 (1959) 6, 12
Kogod v. *Stanley Co.*, 88 U.S. App. D.C. 122, 186 F.2d 763 (1950) 12
Laborers' International Union Local 107 v. *Kunco, Inc.*, 344 F. Supp. 626 (W.D. Ark. 1972), *rev'd*, 472 F.2d 456 (8th Cir. 1973) 17
Lewis v. *Seanor Coal Co.*, 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968) 24
Lithographers Local 19, 130 N.L.R.B. 985 (1961), *enforced in part*, 309 F.2d 31 (9th Cir. 1962), *cert. denied*, 372 U.S. 943 (1963) 8
Local 1896, IAM v. *Brake and Electric Sales Corp.*, 279 F.2d 590 (1st Cir. 1960) 24
Local 174, Teamsters v. *Lucas Flour Co.*, 369 U.S. 95 (1962) 19
McMullen v. *Hoffman*, 174 U.S. 639 (1899) ..6, 10, 11, 12
McNeil v. *Suffolk County Painters Insurance*, 431 F. Supp. 387 (E.D.N.Y. 1977) 28
Miller v. *Ammon*, 145 U.S. 421 (1892) 17
Motor Coach Employees v. *Lockridge*, 403 U.S. 274 (1971) 19-20
Mullins v. *Reitz Coal Co.*, No. 78-0715 (D.D.C. Mar. 23, 1979) 13, 27
Murphy v. *Inexco Oil Co.*, 611 F.2d 570 (5th Cir. 1980) 26
National Alliance of Postal and Federal Employees v. *Klassen*, 168 U.S. App. D.C. 293, 514 F.2d 189, *cert. denied*, 423 U.S. 1037 (1975) 21
National Association of Letter Carriers v. *United States Postal Service*, 192 U.S. App. D.C. 55, 590 F.2d 1171 (1978) 25

TABLE OF AUTHORITIES—Continued

Page

National Electrical Contractors Association, Inc. v. *Howard P. Foley Co.*, 498 F. Supp. 552 (D. Md. 1980) 12

National Woodwork Manufacturers Association v. *NLRB*, 386 U.S. 612 (1967) 8, 9, 18

Nathan v. *Tenna Corp.*, 560 F.2d 761 (7th Cir. 1977) 13

Premier Electrical Construction Co. v. *Miller Davis Co.*, 291 F. Supp. 295 (N.D. Ill. 1968), *aff'd*, 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970) 10

Raymond O. Lewis, 148 N.L.R.B. 249 (1964) 8

Response of Carolina, Inc. v. *Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976) 9

Revlon, Inc. v. *Williams International, Inc.*, 30 Misc. 2d 772, 214 N.Y.S.2d 456 (Sup. Ct. 1961) .. 11, 12

Sheet Metal Workers' National Pension Fund v. *General Metal Products*, No. 80-3328 (D.D.C. Dec. 31, 1980) 28

Sheet Metal Workers' National Pension Fund v. *Supreme Metal Fabricators*, No. 80-3327 (D.D.C. Dec. 31, 1980) 28

Sheet Metal Workers' National Pension Fund v. *Young's Roofing, Inc.*, No. 77-1849 (D.D.C. May 3, 1978) 27

Smith v. *Evening News Association*, 371 U.S. 195 (1962) 19

Smith v. *Hickey*, 482 F. Supp. 644 (S.D.N.Y. 1979) 26

Sola Electric Co. v. *Jefferson Electric Co.*, 317 U.S. 173 (1942) 13

Taggert Corp. v. *Efros*, 475 F. Supp. 124 (S.D. Tex. 1979) 26

Todd Shipyards Corp. v. *Industrial Union of Marine and Shipbuilding Workers Local 39*, 344 F.2d 107 (2d Cir. 1965) 24

Transamerican Mortgage Advisory, Inc. (TAMA) v. *Lewis*, 444 U.S. 11 (1979) 17

TABLE OF AUTHORITIES—Continued

	Page
United Optical Workers Union Local 408 v. *Sterling Optical Co.*, 500 F.2d 220 (2d Cir. 1974), *aff'g United Optical Workers Union Local 408* v. *Sterling Optical Co.*, 74 Lab. Cas. (CCH) ¶ 10,304 (E.D.N.Y. 1973)	23
United States v. *Bayer Co.*, 135 F. Supp. 65 (S.D. N.Y. 1955)	12
United States v. *Howard*, 440 F. Supp. 1106 (D. Md. 1977), *aff'd*, 590 F.2d 565 (4th Cir.), *cert. denied*, 440 U.S. 976 (1979)	22
United States v. *Klein*, 80 U.S. (13 Wall.) 128 (1871)	22
United States v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961)	10, 13
United States Steel Corp. v. *International Union, UMW*, No. 75-1966, Order and Memorandum of Agreement (D.D.C. Oct. 5, 1977)	14
Vaca v. *Sipes*, 386 U.S. 171 (1967)	19, 21
Vendo Co. v. *Lektro-Vend Corp.*, 433 U.S. 623 (1977)	10
Viacom International, Inc. v. *Tandem Productions, Inc.*, 526 F.2d 593 (2d Cir. 1975)	12
Wadsworth v. *Whaland*, 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978)	26
Waggoner v. *R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979)	24
Western Electric Co. v. *Communication Equipment Workers, Inc.*, 554 F.2d 135 (4th Cir. 1977)	25-26
William E. Arnold Co. v. *Carpenters District Council*, 417 U.S. 12 (1974)	19
CONSTITUTIONAL PROVISIONS AND STATUTES	
U.S. CONST. Art. III	22
Employee Retirement Income Security Act of 1974:	
29 U.S.C. § 1001 (1976)	26-27
29 U.S.C. § 1132 (1976)	4, 26

TABLE OF AUTHORITIES—Continued

	Page
29 U.S.C. § 1132(a) (1976)	2, 26
29 U.S.C. § 1132(e)(2) (1976)	28
29 U.S.C. § 1132(f) (1976)	28
29 U.S.C. § 1132(g) (1976)	2, 26
Labor-Management Relations Act:	
29 U.S.C. § 158(a)(3) (1976)	24
29 U.S.C. § 158(b)(4)(B) (1976)	17
29 U.S.C. § 158(e) (1976)	*passim*
29 U.S.C. § 185 (1976)	*passim*
29 U.S.C. § 187 (1976)	17
Sherman Act:	
15 U.S.C. § 1 (1976)	2, 5
15 U.S.C. § 2 (1976)	2, 5
LEGISLATIVE MATERIALS	
National Labor Relations Board, 2 Legislative History of Labor-Management Reporting and Disclosure Act of 1959	15, 16
Employee Retirement Income Security Act of 1974, Conference Report, S. Rep. No. 1090, 93d Cong., 2d Sess. (1974)	26
H.R. No. 1147, 86th Cong., 1st Sess. 39 (1959)	16
BOOKS AND ARTICLES	
H. Hart and H. Wechsler, The Federal Courts and the Federal System (2d Ed. 1973)	22
Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts*, 66 HARV. L. REV. 1362 (1953)	22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Kaiser Steel Corporation ("Kaiser Steel") respectfully petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review that court's judgment of September 17, 1980, in *Mullins* v. *Kaiser Steel Corporation*, No. 79-1463.

OPINIONS BELOW

The opinion of the court of appeals is not yet officially reported and appears as Appendix A to this Petition.[1] The order of the district court from which appeal was taken and the district court's Memorandum Opinion, which is reported at 466 F. Supp. 911, appear as Appendix B. The judgment sought to be reviewed appears as Appendix C. The orders of the court of appeals denying Kaiser Steel's petition for rehearing and suggestion for rehearing en banc appear as Appendix D.

---

[1] The Appendices are bound together in a separate volume.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1980. A timely suggestion for rehearing en banc was denied, by a vote of 7 to 4, on November 12, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Sections 8(e) and 301 of the Labor-Management Relations Act, 29 U.S.C. §§ 158(e), 185 (1976); Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1976); and Sections 502(a) and 502(g) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1132(a), 1132(g) (1976). These statutory provisions are set forth in Appendix E.

STATEMENT OF THE CASE

This appeal from a summary judgment involves the 1974 nationwide collective bargaining agreement between hundreds of coal producers, including numerous steel companies such as Kaiser Steel, and the United Mine Workers Union ("UMW"). The 1974 agreement established the terms and conditions of employment for Kaiser Steel's coal mining employees and, among other things, required Kaiser Steel to make payments to the Trustees of the UMW health and retirement funds ("Trustees") based on the hours worked and coal produced by Kaiser Steel's employees. Kaiser Steel made all of these payments. *See* Appendix ("App.") A at 2a-3a, 6a.

The agreement, in a separate provision commonly referred to as the "purchase-of-coal" clause, also required Kaiser Steel to pay to the Trustees a penalty on all coal that it purchased from coal producers whose employees were not represented by the UMW, even if no UMW producer was able to supply it with comparable coal and even if the non-UMW producers paid wages and benefits

as high as those paid under the UMW agreement. *See* App. A at 3a; court of appeals' Joint Appendix ("J.A.") at 296.[2]

The purchase-of-coal clause evolved from a labor dispute tracing back to the 1940s, when the UMW initiated efforts to deter or bar trade in coal produced by persons other than UMW mine operators. The purpose of the clause is to aid the UMW in its efforts to organize non-UMW coal producers by putting economic pressure on UMW signatories to refrain from buying non-UMW coal. App. A at 35a-36a; J.A. at 296.[3]

Steel companies negotiating with the UMW have consistently objected to the purchase-of-coal clause as an overbroad and illegal restraint on their purchases of non-UMW coal. The steel companies' resistance to the purchase-of-coal clause succeeded until 1971, when, after a long strike, they yielded to the UMW's demands. The penalty clause was made a part of the 1971 collective bargaining agreement and has since been included in the 1974 agreement and the 1978 agreement, which is currently in effect.[4] The Trustees and the UMW apparently intend to include the purchase-of-coal clause in future collective bargaining agreements as well. *See* n.20, *infra*.

From the outset, Kaiser Steel believed that the purchase-of-coal clause violated the federal labor and anti-

---

[2] The amount of money that Kaiser Steel was called upon to pay by the purchase-of-coal clause was one-sixth the amount Kaiser Steel paid to the funds based on coal produced by its employees.

[3] The purchase-of-coal clause has no other purpose: The payments called for by the clause are not designed, or needed, to meet the financial requirements of the funds to which they are to be made; nor is the amount of such payments related either to work performed by UMW employees or to the differences, if any, between UMW and non-UMW wage and benefit levels. *See* J.A. at 280-81, 296-97.

[4] The purchase-of-coal clause in the 1978 agreement is the subject of an action currently pending before the United States District Court for the District of Columbia. *Combs* v. *Kaiser Steel Corp.*, No. 80-2545 (Oct. 6, 1980).

trust laws and refused to make the penalty payments or to account for its purchases of non-UMW coal. The UMW and the Trustees knew for years that Kaiser Steel regularly purchased non-UMW coal from Mid-Continent Coal and Coke Company ("Mid-Continent") without making the penalty payments called for by the purchase-of-coal clause, but they nevertheless adhered to a policy of not attempting to enforce the clause.[5] The UMW and the Trustees themselves doubted the legality of the purchase-of-coal clause, and they feared that attempts to enforce it would subject them to a "rash of antitrust suits."[6]

On April 11, 1978, four months after expiration of the 1974 agreement, the Trustees abandoned their policy of nonenforcement and filed this suit for specific performance of the purchase-of-coal clause. They alleged jurisdiction under Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, and Section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132, and set forth in their complaint a single cause of action—the assertion that Kaiser Steel breached the 1974 agreement in effect between 1974 and 1977 by failing to make payments and reports in accordance with the purchase-of-coal clause. Kaiser Steel defended the suit on the grounds that the

---

[5] App. A at 6a & n.3; J.A. at 294 & n.5, 652-53 & n.3. Because Kaiser Steel's mines produce only high volatile coal and its steel manufacturing process has always required a blend of high volatile coal and mid-volatile coking coal, Kaiser Steel has always had to purchase mid-volatile coking coal from another coal producer. Since 1959, Kaiser Steel has purchased virtually all of its mid-volatile coal requirements from Mid-Continent. J.A at 293.

The UMW has repeatedly tried, without success, to organize Mid-Continent's employees. Mid-Continent's coal mining employees are represented by another coal mining union, and its wages and fringe benefits have consistently been higher than those provided under UMW collective bargaining agreements. *Id.* at 293-94.

[6] Memorandum of Chairman, Board of Trustees (July 19, 1974); *see* Reply Brief for Appellant Kaiser Steel Corporation at 8 n.12 (September 19, 1979).

purchase-of-coal clause violated Section 8(e) of the LMRA, 29 U.S.C. § 158(e), and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2; that payment of the sums called for by that clause would be illegal; and that the clause is void and unenforceable. *See* App. B at 73a; J.A. at 292, 324.

The Trustees moved for summary judgment on the ground that, even if illegal, the purchase-of-coal clause should be enforced against Kaiser Steel. The district court granted the Trustees' motion and, without briefing or discussion, ordered Kaiser Steel to pay the Trustees' attorneys' fees. App. B at 80a.

The court of appeals affirmed the summary judgment. In an opinion by Judge Mikva (joined by District Court Judge Flannery), the panel held that the district court properly refused to entertain Kaiser Steel's defense of illegality and that Kaiser Steel's only recourse, long since foregone, was to have brought a declaratory judgment action against the union or to have filed a charge with the National Labor Relations Board at the outset of the contract period challenging the lawfulness of the purchase-of-coal clause. App. A at 9a, 18a, 28a. The panel also upheld the district court's award of attorneys' fees on the ground that Section 502 of ERISA, which authorizes fee awards, and Section 301 of the LMRA, the statute on which plaintiffs based their claim below but which does not authorize fee awards, are not "so surgically discrete than an action to compel welfare fund contributions required by the terms of a collective bargaining agreement cannot be maintained under both sections." *Id.* at 34a.

Circuit Judge Wilkey dissented from both holdings, finding "no reason in law or logic why any court should enforce a contract clause which plainly violates the law specifically designed to prohibit such clauses" and no statutory authority for the fee award. App. A at 35a, 67a. With four judges dissenting, the court of appeals denied Kaiser Steel's suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' UNPRECEDENTED DECISION ABOLISHING THE DEFENSE OF ILLEGALITY IN CONTRACT ENFORCEMENT ACTIONS RAISES IMPORTANT QUESTIONS OF FEDERAL LAW AND POLICY AND IS CONTRARY TO DECISIONS OF THIS COURT.

It has always been the law, until this case, that courts do not enforce illegal contracts and that an allegation that a contract provision is illegal states a good defense to an action brought to enforce that provision. *E.g.*, *McMullen* v. *Hoffman*, 174 U.S. 639, 654 (1899).[7] As this Court reiterated recently, a defense of illegality is available and will bar a court from enforcing an illegal contract provision "where the judgment of the Court would itself be enforcing the precise conduct made unlawful" by federal law. *Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959).[8]

---

[7] "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." 174 U.S. at 654. *See Gibbs* v. *Consolidated Gas Co.*, 130 U.S. 396, 412 (1889) (" 'The rule of law . . . is of universal operation, that none shall, by the aid of a court of justice, obtain the fruits of an unlawful bargain.' ").

[8] The court of appeals misread *Kelly*. In *Kelly*, the defendant entered into a lawful agreement to purchase onions from the plaintiff. After taking delivery of the onions, the defendant refused to pay for them on the ground that a separate agreement not to deliver onions to the futures market—the so-called "nondelivery agreement"—violated the antitrust laws. In rejecting this defense, the Court said that, "while *the nondelivery agreement* between the parties *could not be enforced* by a court, if its *unlawful* character under the Sherman Act be assumed, it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price." 358 U.S. at 521 (emphasis added). It went on to hold that "*where*, as here, *a lawful sale* for a fair consideration *constitutes an intelligible economic transaction in itself*," it may be enforced. *Id.* (emphasis added).

The court of appeals read *Kelly* to mean that the defense of illegality "does not lie against a contract that is 'an intelligible

In this case, however, the court of appeals held that Kaiser Steel's allegation that the purchase-of-coal clause violates the federal labor and antitrust laws did not state a defense. In so doing, the court of appeals ignored the fact that Section 8(e) and the Sherman Act prohibit not only entering into illegal contract clauses like the purchase-of-coal clause, but also complying with such clauses; indeed, the court ordered specific conduct—the payment of a penalty or surcharge pursuant to the purchase-of-coal clause—that those laws proscribe. Moreover, on the basis of sweeping new principles, the court departed from the heretofore uniform rule that federal courts do not act in aid of unlawful contracts.

The decision below is wrong and likely to be of far-reaching precedential significance. This Court should grant certiorari to prevent the undermining of Congressional policy and the erosion of the prior decisions of the Court.

A. The Court of Appeals Ignored Important Congressional Policies by Ordering Conduct That Is Proscribed by the LMRA and the Sherman Act.

Enforcement of the purchase-of-coal clause would require the "precise conduct" that both Section 8(e) of the LMRA and the Sherman Act proscribe. The court of appeals overlooked this consequence of its decision because of an erroneous construction of Section 8(e) and the Sherman Act that fails to take account of the purposes and meaning of those laws. Indeed, a central flaw

---

economic transaction in itself' " (App. A. at 13a) and held that, because the purchase-of-coal clause is "intelligible," its unlawfulness is no bar to its enforcement. But *Kelly* does not mean that an illegal contract may be enforced so long as it is "intelligible" to the enforcement court or that the illegality defense applies only to contracts that are not intelligible. *Kelly* means that courts should look to the substance of the parties' agreement to see if the *lawful* portion is "an intelligible economic transaction in itself"—*i.e.*, separable from the illegal portion; if the lawful agreement is severable, it may be enforced. But illegal agreements—like the nondelivery agreement in *Kelly* and the purchase-of-coal clause here—may not be enforced.

in the court's decision is that it substituted its sense of public policy for the policies embodied in federal statutes.

First, requiring Kaiser Steel to pay a penalty for dealing with Mid-Continent would cause the very injury that Section 8(e) of the LMRA is principally intended to prevent. Section 8(e) makes unlawful—indeed, "unenforcible and void"—any provision in a collective bargaining agreement that prohibits or penalizes an employer for doing business with another person and has as its purpose or effect achievement of union objectives outside the employer's work unit.[9] Such provisions are known as "hot cargo" agreements.

The purpose of Section 8(e)'s proscription of hot cargo agreements is to prevent a union from using its bargaining power in one work unit to advance union objectives (such as organizing non-union employees) outside that work unit. *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 622-26, 633-35 (1967). Congress intended in part to protect employers outside the work unit (like Mid-Continent) with whom a union has a dispute from being subjected to a boycott by other, "neutral" employers (like Kaiser Steel). But Congress' principal purpose was to protect the *neutral employers* from being caught in the middle of the union's dispute with others. As this Court repeatedly emphasized in *National Woodwork*, the "touchstone" and "central theme" of Section 8(e) is to protect "neutral employers" from being burdened with hot cargo clauses. *Id.* at 624-25, 627, 635, 645.

Focusing exclusively on the effect of its decision on Kaiser Steel's supplier, Mid-Continent, and the fact that the 1974 agreement had expired, the court of appeals concluded that enforcement of the purchase-of-coal clause would not enforce unlawful conduct because it could no longer cause Kaiser Steel to boycott Mid-Continent during

---

[9] *See, e.g., Raymond O. Lewis*, 148 N.L.R.B. 249, 253 (1964); *Lithographers Local 19*, 130 N.L.R.B. 985, 987-88 (1961), *enforced in pertinent part*, 309 F.2d 31 (9th Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

the term of the contract. But while compelling the payments called for by the penalty clause in the 1974 agreement would not deprive Mid-Continent of the sales it had made to Kaiser Steel during the term of that agreement, it would penalize Kaiser Steel for having done business with Mid-Continent during that period.[10] Thus, by enforcing the unlawful purchase-of-coal clause, the court below would cause the precise injury that Section 8(e) is primarily intended to prevent—harm to a neutral employer, Kaiser Steel. The decision undermines the very purpose for which Section 8(e) was enacted and cannot be reconciled with the teachings of *National Woodwork.*

Second, the purchase-of-coal clause violates the Sherman Act by imposing an unlawful surcharge or penalty on purchasers who, like Kaiser Steel, buy some of their coal requirements from non-UMW producers. It is unlawful both because it impairs the ability of non-UMW producers to compete with UMW producers for sales to companies such as Kaiser Steel and because it penalizes such companies when they choose their suppliers on the basis of competitive merit.[11]

In requiring that Kaiser Steel make the penalty payments called for by the purchase-of-coal clause, the court

---

[10] It would also cause *future* boycotts of non-UMW coal producers like Mid-Continent. The successor to the 1974 agreement and other UMW agreements contain, and likely will contain in the future, penalty clauses that are in all pertinent respects identical to the purchase-of-coal clause at issue in this case. *See* n.20, *infra.* In making purchasing decisions, employers subject to these penalty clauses will undoubtedly be influenced by the decision below, and employers who otherwise would buy coal from non-UMW suppliers will be encouraged by the penalty clause to boycott those suppliers.

[11] Because it is unlawful to require purchasers to make payments pursuant to such a clause, those who are required to make such payments may recover three times their amount as treble damages under the antitrust laws. *See, e.g., Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976); *Carpa, Inc.* v. *Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976).

of appeals would thus subject Kaiser Steel to an injury—payment of an unlawful penalty—that the antitrust laws are intended to prevent. It would also give Kaiser Steel an incentive to boycott non-UMW producers such as Mid-Continent in the future. The court's decision would thus cause the precise conduct made unlawful by federal law and deprive Kaiser Steel and the public "of the protection which Congress has conferred." [12]

B. The Court of Appeals' Sweeping Decision Will Eliminate the Defense of Illegality and Have a Significant and Widespread Impact on Future Cases in Which Parties Seek Judicial Aid in Enforcing Unlawful Contracts.

The court of appeals' decision is wrong for another reason as well. Until this case, it has always been the law that courts will not enforce an unlawful contract provision, even if the court's remedy would not require any conduct that is itself illegal.[13] As this Court put it, courts will not lend their aid to a party "seeking to

---

[12] *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961).

[13] In *McMullen* v. *Hoffman*, for example, this Court denied the plaintiff's suit for an accounting of partnership profits, even though the illegal bid fixing scheme that led to formation of the partnership by the two contractors had already been terminated and the accounting would not have brought about any of the effects that the law barring bid fixing was designed to prevent. As the Court stated: "In the case before us the cause of action grows directly out of the illegal contract, and if the Court distributes the profits it enforces the contract which is illegal." 174 U.S. at 660. *See also, e.g., Farbenfabriken Bayer A.G.* v. *Sterling Drug, Inc.* 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963) (refusing request for an accounting and a share of the profits from an unlawful market allocation agreement); *Premier Electrical Constr. Co.* v. *Miller Davis Co.*, 291 F. Supp. 295 (N.D. Ill. 1968), *aff'd*, 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970) (denying enforcement of subcontracting agreement conditioned on illegal bid fixing arrangement). *Cf. Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 646 n.3 (1977) (Stevens, J., dissenting) (noting that enforcement of contract clauses in such cases "would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act.").

realize the fruits of an agreement that appears to be tainted with illegality." *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U.S. 227, 262 (1909).[14]

While the court of appeals in this case naturally focused on plaintiffs' particular claim against Kaiser Steel, its decision to depart from prior law rested on principles of policy and equity that will have significant, far-reaching impact. Adverting to notions of "unjust enrichment" and "waiver," the court of appeals held that Kaiser Steel was not entitled to raise the illegality defense because it had previously "ignored" the clause without pursuing *offensively* "its opportunities for a timely and direct adjudication of its rights." [15]

The court of appeals has for all practical purposes written the defense of illegality out of the law. By definition, a party can raise a *defense* of illegality only by waiting until suit is brought against it. Recognition of the illegality defense *always* relieves the defendant of an obligation he undertook and denies the plaintiff a benefit he bargained for. Yet, until now, the courts have uniformly held that an illegal contract provision will not be enforced, even if the plaintiff is seeking accrued

---

[14] If that were not the law, a hired murderer, after performing his part of a contract to kill, could prevail in a suit for the contract price on the theory that compelling payment would not bring about a homicide and thus would not cause the very conduct forbidden by law. That result would be unthinkable.

[15] App. A at 18a. The court of appeals also evidently thought that this case was somehow different from all the rest because the clause had not previously been found to be illegal and the issue was therefore whether "the district court properly declined to entertain the defense" of illegality. *Id.* at 9a n.6. But this distinction has no support in law or policy; in almost all of the cases in which enforcement of a contract clause was refused on grounds of illegality the contract provision had not previously been found to be unlawful. *See, e.g., Continental Wall Paper Co.* v. *Louis Voight & Sons Co., supra; McMullen* v. *Hoffman, supra; Eiberger* v. *Sony Corp.*, 459 F. Supp. 1276 (S.D.N.Y. 1978), *aff'd*, 622 F.2d 1068 (2d Cir. 1980); *Revlon, Inc.* v. *Williams Int'l, Inc.*, 30 Misc. 2d 772, 214 N.Y.S.2d 456 (Sup. Ct. 1961).

obligations and the defendant has benefited from the contract as a whole and has received all the consideration due him.[16] No court before now has enforced an illegal agreement on the ground that the parties agreed to it and otherwise carried out their bargain or that nonenforcement would unjustly enrich the defendant.[17]

Nor has the illegality defense been rejected on grounds of waiver or estoppel.[18] On the contrary, until now it

---

[16] *See, e.g.*, cases cited in n.17, *infra*, and *Associated Press* v. *Taft-Ingalls Corp.*, 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965). *See also National Electrical Contractors Ass'n, Inc.* v. *Howard P. Foley Co.*, 498 F. Supp. 552 (D. Md. 1980).

The cases on which the court of appeals relied are all very different. *Kelly* v. *Kosuga*, *supra*, and *Huge* v. *Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979), upon which the court below principally relied, involved *lawful* contract clauses alleged by the defendants to be unenforceable because of "collateral" illegalities of *other* parts of the parties' agreements. *See also* App. A at 16a-17a, *citing Viacom Int'l, Inc.* v. *Tandem Productions, Inc.*, 526 F.2d 593, 598 (2d Cir. 1975) (whether a contract clause could be enforced would "depend on the court's perception of the contract [provision sought to be enforced] as a separate or 'collateral' entity or as an integral part of [the illegal provision], enforcement of which would effectuate 'the precise conduct made unlawful' " by the antitrust laws).

[17] Indeed, the courts have refused to enforce contract clauses that were found to be illegal where the plaintiff was suing for money owed for services previously rendered or goods previously supplied (*e.g.*, *McMullen* v. *Hoffman*, *supra*; *Farbenfabriken Bayer A.G.* v. *Sterling Drug, Inc.*, 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963); *Kogod* v. *Stanley Co.*, 186 F.2d 763 (D.C. Cir. 1950); *Eiberger* v. *Sony Corp.*, 459 F. Supp. 1276 (S.D.N.Y. 1978), *aff'd*, 622 F.2d 1068 (2d Cir. 1980); *United States* v. *Bayer Co.*, 135 F. Supp. 65 (S.D.N.Y. 1955); *Revlon, Inc.* v. *Williams Int'l, Inc.*, 30 Misc. 2d 772, 214 N.Y.S.2d 456 (Sup. Ct. 1961); where the contract had already expired by its terms (*id.*); where the plaintiff had performed all of his obligations (*id.*); and even where the defendant himself benefited from that which made the contract clause illegal (*e.g.*, *McMullen* v. *Hoffman*, *supra*; *Farbenfabriken Bayer A.G.* v. *Sterling Drug, Inc.*, *supra*; *United States* v. *Bayer Co.*, *supra*).

[18] Applying waiver principles to strike the illegality defense is especially inappropriate in this case, for the court of appeals illogi-

has always been recognized that those doctrines have no place in an action brought to enforce a contract that is forbidden by statute or contrary to public policy. "Such a contract has no legal existence . . . and neither action nor inaction of a party to it can validate it and no conduct of a party to it can be invoked as an estoppel against asserting its validity." [19]

Because the court of appeals' rationale would justify—indeed, require—enforcement of an illegal contract clause in most if not all contract enforcement actions, the practical impact of the decision is likely to be substantial.[20]

---

cally and unfairly allocated responsibility between the parties. Both the Trustees and Kaiser Steel long doubted the legality of the purchase-of-coal clause, and both long knew of Kaiser Steel's refusal to comply with it. Both could have brought suit sooner, but both chose not to. If either party should be charged with the risk of inaction, it is the Trustees. Only they knew whether they would reverse their longstanding policy of nonenforcement, making litigation regarding the lawfulness of the purchase-of-coal clause necessary and appropriate.

[19] *Cecil B. DeMille Productions* v. *Woolery*, 61 F.2d 45, 49 (9th Cir. 1932). As this Court recognized in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 565 (1961), "even if [nonenforcement of an illegal contract] . . . in a given case may seem harsh . . . that result is dictated by the public policy manifested by the statute." *See also, e.g., Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173 (1942); *Nathan* v. *Tenna Corp.*, 560 F.2d 761 (7th Cir. 1977); *Inter-Continental Promotions, Inc.* v. *Miami Beach First Nat'l Bank*, 441 F.2d 1356 (5th Cir.), *cert. denied*, 404 U.S. 850 (1971); *Doherty* v. *Bartlett*, 81 F.2d 920 (1st Cir.), *cert. denied*, 298 U.S. 676 (1936).

[20] The court's determination has already been relied on by the Trustees in actions brought to enforce against Kaiser Steel the purchase-of-coal clause in the 1978 collective bargaining agreement (*see* n.4, *supra*) and to enforce against another steel company the penalty clause in the 1974 agreement (*Mullins* v. *Reitz Coal Co.*, No. 78-0715 (D.D.C. Mar. 23, 1979)). Plaintiffs and the UMW apparently intend to continue to insist upon the inclusion of these penalty clauses in future contracts. They settled recent litigation with U.S. Steel Corporation only after extracting from U.S. Steel

If left to stand, the court's decision would provide an incentive for parties to include unlawful provisions in their agreements in the expectation that the defense of illegality will not be available if enforcement is sought. It would thus promote unlawful conduct and erode the public interests served by the federal laws proscribing such conduct.

Moreover, under the rule established below, parties to contracts of questionable legality would be induced to initiate legal proceedings—even if no efforts to enforce the contracts or secure compliance have been made or could be foreseen—solely to ensure that they will not later be estopped from arguing that the contracts are illegal. The decision would thus lead to a proliferation of what may be wholly unnecessary lawsuits.

II. THE COURT OF APPEALS' HOLDING THAT FEDERAL COURTS HAVE NO JURISDICTION TO DECIDE WHETHER CONTRACT CLAUSES THEY ARE ASKED TO ENFORCE VIOLATE SECTION 8(e) OF THE LMRA IS ERRONEOUS AND CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS.

The court of appeals held that the district court did not have jurisdiction to determine whether the purchase-of-coal clause violated Section 8(e), even in an action brought for specific performance of that clause. Only the NLRB, said the court, can decide in the first instance whether a contract clause violates Section 8(e). The court's construction of the LMRA is erroneous, probably unconstitutional, and in conflict with decisions of at least two other circuits.

---

a promise that it would not challenge the lawfulness of the penalty clause, by litigation or negotiation, in either the 1974 Agreement or any other agreement in the future. *United States Steel Corp.* v. *International Union, UMW*, No. 75-1966, Order and Memorandum of Agreement (D.D.C., filed Oct. 5, 1977).

A. The Court of Appeals Has Misunderstood Section 8(e) and the Prior Decisions of This Court.

Congress provided in Section 8(e), in language that could not be more clear, that all hot cargo clauses [21] shall be "unenforcible and void." [22] That language is an unmistakable statutory command that hot cargo provisions are void at their inception and are at all times unenforceable by the federal courts.[23] As Congressman Griffin, the sponsor of the House bill, said of a provision that became Section 8(e):

> "Subsection (b) of Section 705 *not only* makes it an *unfair labor practice* to enter into a 'hot cargo' agree-

[21] With exceptions, for the construction and garment industries, not relevant in this case.

[22] *See* National Labor Relations Board, 2 Legislative History of Labor-Management Reporting and Disclosure Act of 1959 ("Legis. Hist.") at 1258, 1290, 1361 (1959) (remarks of Senators Kennedy and Goldwater).

That Congress intended to prohibit the enforcement of hot cargo clauses is made clear also by the contrast of the main clause of Section 8(e) with the "garment industry" proviso to the section, which states that Section 8(e) is not intended to *"prohibit the enforcement"* of those garment industry agreements that are exempted from the general prohibition of hot cargo clauses. 29 U.S.C. § 158(e) (emphasis added).

[23] Senator Goldwater, one of the original sponsors of the bill that became Section 8(e), described the law as rendering hot cargo provisions "unenforcible and void for all purposes" and added:

> "This means that *such contractual clauses are per se illegal. It is unlawful for either party* even to execute such an agreement, to insist that the other party bargain about or enter into it, to use any form of coercion or restraint—economic or otherwise—*to compel the other party to enter into it, or to live up to it even if his refusal to do so is in breach* of a voluntary agreement to abide by the agreement, and finally, such breach does not constitute a good cause of action in a suit at law to recover damages for the breach or to secure specific performance of the agreement." 2 Legis. Hist. at 1857 (emphasis added).

See also remarks of Representative Kearns, *id.* at 1861.

ment, *but also*, makes it clear that such contracts are '*void and unenforcible.*'" National Labor Relations Board, 2 Legislative History of Labor-Management Reporting and Disclosure Act of 1959 at 1523 (1959) (emphasis added).[24]

The court of appeals' construction of Section 8(e) is both less straightforward and untenable. According to the court of appeals, the "unenforcible and void" language does not prohibit the enforcement of illegal hot cargo clauses or, as the court put it, provide a "remedy of contract avoidance"; it serves instead only to prevent a union from obtaining specific performance of an agreement by an employer to boycott a third party supplier.[25]

The court made two errors. First, the court overlooked the primary purpose of Section 8(e), which, as noted, is to protect neutral employers like Kaiser Steel, not boycotted third parties. It makes no sense to construe the most explicit and powerful part of Section 8(e) to protect only parties whose interests were not of primary concern to Congress.

Second, and more important, by treating the case as if Kaiser Steel had initiated litigation seeking a "remedy of contract avoidance," the court erroneously got sidetracked on the primary jurisdiction issue. It was plaintiffs, not Kaiser Steel, who sought a remedy in this case; the court should thus have asked whether plain-

---

[24] *See also*, H.R. No. 1147, 86th Cong., 1st Sess. 39 (1959) (the statute "makes any such agreement heretofore or hereafter executed unenforcible and void"); remarks of Congressman Rhodes, 2 Legis. Hist. at 1581 ("not only . . . an unfair labor practice . . . but also . . . void and unenforceable").

[25] App. A at 22a. The court actually said that it construed the language to prevent unions "from obtaining specific performance of a 'hot cargo' clause . . . ." *Id.* at 23a. Since plaintiffs in this case sought, and obtained from the lower courts, specific performance of the hot cargo clause here at issue, the court's stated principle would compel a result different from that which it reached. Presumably, therefore, the court meant that the "unenforcible and void" language was intended to prohibit specific performance of actual refusals to deal, not all forms of specific performance of illegal hot cargo clauses.

tiffs had any right to the specific performance remedy they sought. Had the court asked that question, it would have understood that it could not enforce the purchase-of-coal clause without deciding whether the clause violated Section 8(e)—whether, in other words, it created any valid, legal obligations.

Where a contract provision, such as an illegal hot cargo clause, is void as against public policy, it has no existence in the eyes of the law: It is "nugatory and without legal effect." [26] As this Court stated recently, where a statute provides that a contract is "void," "[*a*]*t the very least* Congress must have assumed that [the statute] could be raised *defensively in private litigation to preclude the enforcement* of . . . [the] contract." *Transamerican Mortgage Advisory, Inc.* (*TAMA*) v. *Lewis*, 444 U.S. 11, 18 (1979) (emphasis added).

Congress intended no departure from these principles in enacting Section 8(e) and providing that hot cargo clauses are "unenforcible and void." [27] Indeed, prior deci-

---

[26] *Boatland, Inc.* v. *Brunswick Corp.*, 558 F.2d 818, 823 (6th Cir. 1977). *See also Miller* v. *Ammon*, 145 U.S. 421, 427 (1892) (It is "the ordinary rule that an act done in disobedience to the law creates no rights of action which a court of justice will enforce."); *Laborers' Int'l Union Local 107* v. *Kunco, Inc.*, 344 F. Supp. 626, 630 (W.D. Ark. 1972), *rev'd on other grounds*, 472 F.2d 456 (8th Cir. 1973) (where a contract is prohibited by law, "no cause of action for an alleged breach thereof can be maintained.").

[27] The rationale for precluding federal courts from deciding labor law issues—that only the NLRB is competent to decide them—has no application to the issues that arise under Section 8(e). Federal courts are empowered by Section 303 of the LMRA, 29 U.S.C. § 187, to decide the same issues. Section 303 authorizes federal courts to hear suits for damages brought by anyone alleging injury from a violation of Section 8(b)(4)(B) of the LMRA, and the question raised by Kaiser Steel's defense—whether the purchase-of-coal clause is designed to serve union objectives outside Kaiser Steel's work unit—is the same question that courts decide in actions arising under Section 303.

The court of appeals in this case evidently understood that federal courts are competent to decide hot cargo questions. As noted,

sions of this Court, although not directly deciding the question posed in this case, make clear that Congress' prohibition of hot cargo clauses can be raised defensively in private litigation to preclude the enforcement of such a clause.

In *National Woodwork Manufacturers Association* v. *NLRB*, *supra*, this Court recognized that Section 8(e) was added to the LMRA precisely to prevent

> "the possibility of damage actions against employers for breaches of 'hot cargo' clauses." 386 U.S. at 634.

And in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 628 (1975), this Court—far from deferring to any exclusive NLRB jurisdiction—decided in the first instance that the contract in question there was illegal under Section 8(e).[28] The Court found "no legislative history in the 1959 Congress suggesting that labor-law remedies for § 8(e) violations were intended to be exclusive." *Id.* at 634. As Justice Stewart said, in a passage with which no Justice disagreed:

> "[T]he signatory of a purely voluntary agreement that violates § 8(e) is fully protected from any dam-

---

it would permit federal courts to decide whether a contract clause violates Section 8(e) in an action brought to enforce the boycott itself.

[28] The issue in *Connell* was whether a contract clause violated the Sherman Act. In order to reach that issue the Court had to determine whether the clause comported with Section 8(e) and therefore was immune from antitrust scrutiny. The Supreme Court held that the clause violated Section 8(e) and therefore was not immune from scrutiny under the Sherman Act. 421 U.S. at 626, 634.

Had Kaiser Steel done what the court of appeals said it should have done—sought a declaratory judgment that the purchase-of-coal clause violates the Sherman Act—then under *Connell*, the court would have had to determine whether the purchase-of-coal clause violates Section 8(e) in order to decide whether it is immune from antitrust scrutiny. In other words, the court would have had to do precisely what the court of appeals said it had no power to do: examine in the first instance the legality of the purchase-of-coal clause under the LMRA.

> age that might result from the illegal 'hot cargo' agreement by *his ability simply to ignore the contract provision that violates § 8(e)* . . . . Since § 8(e) provides that any prohibited agreement is 'unenforceable and void,' *any union effort to invoke legal processes to compel the neutral employer to comply with his purely voluntary agreement would obviously be unavailing.*" *Id.* at 649 n.9 (emphasis added).

The court of appeals' decision not only misconstrues Section 8(e) itself but also runs afoul of a more general principle, manifest in a long line of decisions, that the doctrine of primary NLRB jurisdiction does not prevent a federal court from deciding labor law issues that arise in actions, like this one, "brought under independent federal remedies." *Id.* at 626.[29] It has thus repeatedly been held, for example, that a federal court may decide all relevant legal questions in actions, like this one, brought to enforce a collective bargaining agreement under Section 301 of the LMRA and that the exclusive jurisdiction doctrine has "no application" to such actions.[30] As this Court put it in *Motor Coach Employees*

---

[29] *See De Magno* v. *United States*, No. 79-1852 (D.C. Cir. Sept. 24, 1980), in which the court held that "a court's lack of jurisdiction to decide an issue directly" when raised by a plaintiff "does not limit the court's power to decide the question to the extent it is relevant to the dispute over which it does have jurisdiction." Slip op. at 23. Indeed, a court may decide the merits of a defendant's claim that a contract which the court is called upon to enforce violates the law even if such question would normally lie within the exclusive jurisdiction of another forum. *Id. See also, e.g., Big Top Stores, Inc.* v. *Ardsley Toy Shoppe, Ltd.*, 64 Misc. 2d 894, 315 N.Y.S.2d 897 (Sup. Ct. 1970), *aff'd*, 36 A.D.2d 582, 318 N.Y.S.2d 924 (App. Div. 1971) (exclusive federal court jurisdiction over Sherman Act claims does not bar state courts from entertaining defenses of illegality under that Act).

[30] *E.g., William E. Arnold Co.* v. *Carpenters District Council*, 417 U.S. 12, 16 (1974); *Vaca* v. *Sipes*, 386 U.S. 171, 184 (1967); *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 245 n.5 (1962); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 101 n.9 (1962). *See also Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962).

v. *Lockridge*, 403 U.S. 274, 300 (1971), "courts should be free to interpret and enforce collective bargaining agreements even where that process may involve condemning or permitting conduct arguably subject to the protection or prohibition of the National Labor Relations Act." [31]

The court of appeals' decision cannot be reconciled with this principle. Whatever may be the exclusive jurisdiction of the NLRB to grant remedies to employers like Kaiser Steel when they initiate litigation, it does not preclude a federal court from first looking to see if a contract clause it is asked to enforce is illegal before leaping to give the remedy of specific enforcement.

B. As Construed by the Court of Appeals, the LMRA Would Unconstitutionally Intrude Upon the Ability of the Federal Courts To Decide Contract Enforcement Actions.

The court of appeals' construction of Section 8(e) not only cannot be reconciled with the plain meaning of the statute, its legislative history or the prior decisions of this Court, but also raises a serious constitutional question. As construed by the court of appeals, the LMRA would unconstitutionally intrude upon the federal courts' ability to decide contract enforcement actions over which Congress gave them jurisdiction and thus offend the constitutional requirement of the separation of powers. This constitutional problem further demonstrates that the court of appeals' construction of the LMRA is erroneous and provides an additional reason for this Court to review the court of appeals' decision.

The parties and the lower courts agree that the district court had jurisdiction to entertain plaintiffs' action

---

[31] *See also Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 513 (1962) ("Congress deliberately chose to leave the enforcement of collective bargaining agreements 'to the usual processes of the law.'").

under Section 301 of the LMRA.[32] But the court of appeals went further and held that, in such a Section 301 action, the court is to determine only "what a particular contract provision means and whether its obligations have been fulfilled"; whether the contract clause violates Section 8(e), it said, is for the NLRB to decide.[33]

But the NLRB is under no obligation to examine a contract provision, even on request of a party like Kaiser Steel. Indeed, as the court of appeals recognized, a decision by the general counsel of the NLRB not to commence an enforcement proceeding in response to an employer's complaint challenging the lawfulness of a hot cargo clause is not reviewable by any court.[34]

Thus, by holding that a federal court may not determine the lawfulness of a contract clause under Section 8(e) in an enforcement action under Section 301, the court has left employers like Kaiser Steel with the prospect that they may be compelled to comply with a contract clause the lawfulness of which *no court* has been able to review. The court of appeals' decision also means that a federal court must, pursuant to Section 301 of the LMRA, enforce an illegal hot cargo clause even though *neither it nor any other court* has ever been able to pass on the lawfulness of the clause.

The court of appeals' conclusion that Congress intended the LMRA to preclude consideration of the legality of a contract that it authorized the federal courts to enforce raises grave constitutional problems. It has

---

[32] Section 301 vests in the district courts jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . ."

[33] App. A at 23a-24a.

[34] *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *Associated Builders and Contractors* v. *Irving*, 610 F.2d 1221, 1226 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 294 (1980); *National Alliance of Postal and Federal Employees* v. *Klassen*, 514 F.2d 189, 197 (D.C. Cir.), *cert. denied*, 423 U.S. 1037 (1975).

been clear for over a hundred years that Congress may not grant a federal court jurisdiction to decide a case and then tell it how to decide,[35] and Article III of the Constitution precludes withdrawing controlling questions of law from federal enforcement courts.[36] In the absence of a compelling showing in the LMRA or its legislative history that Congress intended to bar a court from considering the legality of contracts it is called upon to enforce, the statute should not be read to produce this impermissible result.

The Article III question raised here is of crucial importance to our constitutional scheme; and the LMRA itself—and Sections 301 and 8(e) in particular—have widespread application. The court of appeals' decision, which misapprehends the meaning of Section 8(e) and imputes to Congress an intention to encroach impermissibly on the power of the federal courts fully to decide contract enforcement actions properly before them, should not be allowed to stand.

---

[35] *E.g.*, *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). *See also, e.g.*, *De Magno* v. *United States*, No. 79-1852, Slip op. at 24 (D.C. Cir. Sept. 24, 1980) (to permit an agency "to enlist the coercive power of the courts to enforce a money judgment against an individual without the basis of the . . . claim ever being subject to judicial scrutiny . . . is contrary to the very notion of an ordered government of checks and balances"); *United States* v. *Howard*, 440 F. Supp. 1106 (D. Md. 1977), *aff'd on other grounds*, 590 F.2d 565 (4th Cir.), *cert. denied*, 440 U.S. 976 (1979).

[36] As Professor Hart put it in his famous "Dialogue":

> "Name me a single Supreme Court case that has squarely held that, in a civil enforcement proceeding, questions of law can be validly withdrawn from the consideration of the enforcement court where no adequate opportunity to have them determined by a court has been previously accorded. When you do, I'm going back to re-think *Marbury* v. *Madison*."

Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1378-1379 (1953), *reprinted in* H. Hart and H. Wechsler, The Federal Courts and the Federal System (2d Ed. 1973) at 330, 341 (footnote omitted).

C. The Court of Appeals' Decision Conflicts with Decisions of at Least Two Other Circuit Courts.

The court of appeals' decision that a federal court may not in the first instance decide whether a contract clause violates Section 8(e) conflicts with the decisions of at least two other circuit courts.

The Second Circuit is the most squarely contrary: It has held that a federal court, in an action under Section 301 to enforce a clause in a collective bargaining agreement, may itself determine that the clause violates Section 8(e) and therefore refuse to enforce it. *United Optical Workers Union Local 408* v. *Sterling Optical Co.*, 500 F.2d 220 (2d Cir. 1974), *aff'g United Optical Workers Union Local 408* v. *Sterling Optical Co.*, 74 Lab. Cas. (CCH) ¶ 10,304 at 17,067 (E.D.N.Y. 1973).[37] In another case, the Second Circuit stated that "resort to the court to enforce a provision invalid under § 8(e) will almost always be futile, given the section's declaration that such provisions are unenforcible [sic] and void." *Carrier Air Conditioning Co.* v. *NLRB*, 547 F.2d 1178, 1191 n.15 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977). Indeed, the Second Circuit has even held that the primary jurisdiction doctrine does not bar a district court from entertaining an employer's suit seeking a declaratory judgment that a clause in a collective

---

[37] In *Botany Indus., Inc.* v. *Clothing Workers*, 375 F. Supp. 485 (S.D.N.Y.), *vacated as moot*, 506 F.2d 1246 (2d Cir. 1974), the employer defended a union's Section 301 suit to enforce an arbitrator's award directing the employer to comply with a clause in their collective bargaining agreement on the ground that enforcement of an award would be improper because the cause violated Section 8(e). The court rejected the union's contention that the court lacked jurisdiction to hear the Section 8(e) defense, relying on the holding of *Hurd* v. *Hodge*, 334 U.S. 24, 35 (1948), that "[w]here the enforcement of private agreements would be violative of [the public policy of the United States as manifested in the Constitution, treaties, and federal statutes], it is the obligation of courts to refrain from such exertions of judicial power."

bargaining agreement violates Section 8(e). *Todd Shipyards Corp.* v. *Industrial Union of Marine and Shipbuilding Workers Local 39*, 344 F.2d 107 (2d Cir. 1965).

The court of appeals' decision in this case is also in conflict with the law of the First Circuit, which has rejected the contention that the NLRB has exclusive jurisdiction to decide unfair labor practice issues in the first instance. In *Local 1896, IAM* v. *Brake and Electric Sales Corp.*, 279 F.2d 590 (1st Cir. 1960), the First Circuit affirmed a district court's refusal to enforce a union security and arbitration clause in a collective bargaining agreement on the ground that enforcement would involve a violation of Section 8(a)(3) of the LMRA.

The law of the Third Circuit is less clear. In *Huge* v. *Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979), the court stated, without having to decide, that a federal court may not initially decide an issue of labor law illegality.[38] But in *Lewis* v. *Seanor Coal Co.*, 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968), the same court made clear that a contract clause which is itself an illegal hot cargo clause may not be enforced.

One other circuit court agrees with the court of appeals in this case. In *Waggoner* v. *R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979), the Ninth Circuit ruled that the NLRB's primary jurisdiction precludes federal courts from acting as the initial arbiters of unfair labor practice charges in actions brought under Section 301.

In short, five circuit courts have addressed the question whether and when federal courts may entertain

---

[38] It was not argued in *Huge* that the contract provision there sought to be enforced was itself unlawful; rather, the employer defended on the ground that a wholly separate provision violated Section 8(e). The court thus had no need to resolve the Section 8(e) issue in order to dispose of plaintiffs' contract claim.

defenses of labor law illegality in contract enforcement actions. They have reached widely varying and conflicting conclusions. The issues are important, and this Court should grant certiorari to resolve the conflict in the circuits.

III. THE COURT OF APPEALS' DECISION AFFIRMING THE AWARD OF ATTORNEYS' FEES STRETCHES ERISA JURISDICTION FAR BEYOND CONGRESS' INTENT, FLOUTS THIS COURT'S DECISION IN *ALYESKA*, AND PROMISES TO STIMULATE PENSION AND ATTORNEYS' FEES LITIGATION IN THE FEDERAL COURTS.

In *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), this Court decided that federal courts may not award attorneys' fees to prevailing litigants unless authorized to do so by federal statute.[39] If the court of appeals' novel and cursory approach to statutory construction in general—and to the scope of ERISA jurisdiction in particular—is left standing, there will be a gaping loophole to this otherwise basic legal principle.

Plaintiffs' complaint alleges a single cause of action—failure by Kaiser Steel to comply with the 1974 collective bargaining agreement. Plaintiffs alleged, and Kaiser Steel and the lower courts agreed, that the district court had jurisdiction under Section 301 of the LMRA to provide plaintiffs with the relief they sought. No statute, however, authorizes an award of attorneys' fees in suits brought under Section 301.[40]

---

[39] Only Congress has the "power and judgment" to determine when attorneys' fees are appropriate; the judiciary is not free to "pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others . . . ." *Id.* at 269.

[40] *E.g.*, *General Tel. Co.* v. *International Bhd. of Electrical Workers Local 89*, 554 F.2d 985, 987 (9th Cir. 1977); *National Ass'n of Letter Carriers* v. *United States Postal Service*, 590 F.2d 1171, 1176 & n.5 (D.C. Cir. 1978); *Western Elec. Co.* v. *Communi-*

Plaintiffs also claimed jurisdiction under Section 502 of ERISA, 29 U.S.C. § 1132, which (unlike the LMRA) authorizes courts to award attorneys' fees. Section 502(g), 29 U.S.C. § 1132(g). But plaintiffs did not allege that Kaiser Steel had violated ERISA, and they did not even put in the record any plan regulated by ERISA. There was, therefore, no jurisdiction under ERISA. *See* 29 U.S.C. § 1132(a)(3).[41]

ERISA is not intended to regulate collective bargaining agreements or "to control every aspect of the employer-employee relationship or every promise made to employees."[42] Its purpose is to protect beneficiaries from incompetent or dishonest fiduciaries and "to curb the funding and disclosure abuses of employee pension and welfare benefit plans by establishing minimum federal standards."[43]

---

cation Equipment Workers, Inc., 554 F.2d 135, 138 (4th Cir. 1977); *International Bhd. of Electrical Workers Local 12* v. *A-1 Elec. Service, Inc.*, 535 F.2d 1 (10th Cir. 1976), *cert. denied*, 429 U.S. 832 (1976).

[41] *See also Smith* v. *Hickey*, 482 F. Supp. 644, 650 (S.D.N.Y. 1979) (jurisdiction under Section 502 of ERISA does not exist when "plaintiffs are not seeking redress for any violation of ERISA"). As Congress said, "civil actions may be brought [under ERISA] by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and for relief from breach of fiduciary duty." *Employee Retirement Income Security Act of 1974, Conference Report*, S. Rep. No. 1090, 93d Cong., 2d Sess. 327 (1974).

[42] *Taggert Corp.* v. *Efros*, 475 F. Supp. 124, 125 (S.D. Tex. 1979), *citing Wadsworth* v. *Whaland*, 562 F.2d 70, 73-74 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978).

[43] *Murphy* v. *Inexco Oil Co.*, 611 F.2d 570, 574 (5th Cir. 1980). Section 2 of ERISA describes the statute's purpose as follows:

> "[T]o protect . . . the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate

Plaintiffs do not need ERISA jurisdiction to enforce the collective bargaining agreement; Section 301 of the LMRA provides a fully adequate remedy for their contract claim.[44] Apparently, plaintiffs alleged ERISA jurisdiction only in order to provide a basis for claiming attorneys' fees.[45] If left to stand, the court of appeals' decision awarding attorneys' fees as if there were ERISA jurisdiction would encourage other litigants also "to add perhaps unjustified ERISA claims to their suits in the hopes of recovering attorneys' fees after prevailing on other claims." [46]

---

remedies, sanctions, and ready access to the Federal Courts." 29 U.S.C. § 1001.

See Cate v. *Blue Cross & Blue Shield*, 434 F. Supp. 1187, 1190 (E.D. Tenn. 1977) ("It is clear from this declaration of policy, and from the structure of the Act, that the focus of Congress was on the 'conduct, responsibility and obligation' of those who were responsible for administering employee benefit plans.").

[44] *Cf. International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 570 (1979) ("Congress believed that it was filling a regulatory void when it enacted ERISA."). This Court has recently granted certiorari in another case to examine the relationship between other provisions of the LMRA and ERISA. *Amax Coal Co.* v. *NLRB*, 614 F.2d 872 (3d Cir. 1980), *cert. granted*, 49 U.S.L.W. 3515 (1981).

[45] *Compare Cowan* v. *Keystone Employee Profit Sharing Fund*, 586 F.2d 888, 892 (1st Cir. 1978) *quoting Bell* v. *Hood*, 327 U.S. 678, 682 (1946).

[46] *Fase* v. *Seafarers Welfare and Pension Plan*, 79 F.R.D. 363, 366 (E.D.N.Y. 1978). The court of appeals cites nine instances in which suits brought to compel contributions to pension funds joined ERISA claims and resulted in an award of attorneys' fees: *Mullins* v. *Reitz Coal Co.*, No. 78-0715 (D.D.C. March 23, 1979); *Huge* v. *Reid*, 468 F. Supp. 1024 (N.D. Ala. 1979), *aff'd mem.*, 615 F.2d 916 (5th Cir. 1980); *Huge* v. *Maximeadows Mining Co.*, 459 F. Supp. 267 (N.D. Ala. 1978); *Bugher* v. *Southland Fabricators and Erectors, Inc.*, 452 F. Supp. 870 (W.D. La. 1978); *Sheet Metal Workers Nt'l Pension Fund* v. *Young's Roofing, Inc.*, No. 77-1849 (D.D.C. May 3, 1978); *Huge* v. *Overly*, 445 F. Supp. 946 (W.D. Pa. 1978); *IAM Nt'l Pension Fund* v. *Ward La France Truck Corp.*, C.A. 77-1206 (D.D.C. Feb. 1, 1978); *Bugher*

Indeed, one can imagine all kinds of interests future litigants will have in claiming ERISA jurisdiction in actions otherwise properly brought under other statutes —to take advantage of ERISA remedies[47] or its relaxed amount in controversy or venue requirements,[48] for example, as well as attorneys' fees. If plaintiffs can take advantage of ERISA jurisdiction whenever they can state a claim under another statute that the court finds not "surgically discrete" from ERISA—whatever that means—ERISA will have become a license for a flood of lawsuits Congress never envisioned and did not authorize when it enacted that statute.

---

v. *Frash*, 98 L.R.R.M. 3010 (S.D. Ind. 1977). *See* App. A at 34a n.14.

Since the court of appeals' decision, there have been at least two other cases filed in the District of Columbia Circuit in which plaintiffs seek attorneys' fees under ERISA for violations of collective bargaining agreements. *See Sheet Metal Workers' Nt'l Pension Fund* v. *General Metal Products*, No. 80-3328 (D.D.C. filed Dec. 31, 1980); *Sheet Metal Workers' Nt'l Pension Fund* v. *Supreme Metal Fabricators*, No. 80-3327 (D.D.C. filed Dec. 31, 1980).

[47] *See e.g. Cate* v. *Blue Cross & Blue Shield*, 434 F. Supp. 1187, 1190-91 (E.D. Tenn. 1977) (ERISA does not confer jurisdiction over "an insurer whose only relation to an employee beenfit plan is its contract to guarantee insurance benefits to participants in the plan"); *McNeil* v. *Suffolk Cty Painters Ins.*, 431 F. Supp. 387, 388 (E.D.N.Y. 1977) (ERISA does not confer jurisdiction over an action "brought to enforce the arbitration clause of [an] employment contract between [the] trustees and [the] fund's administrator").

[48] ERISA allows for federal jurisdiction "without respect to the amount in controversy or the citizenship of the parties," 29 U.S.C. § 1132(f), and provides for venue "in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found," 29 U.S.C. § 1132(e)(2).

CONCLUSION

For the reasons stated above, certiorari should be granted to review the judgment of the court of appeals.

Respectfully submitted,

ROBERT A. HAMMOND, III
A. DOUGLAS MELAMED *
LYNN BREGMAN
JOSEPH A. GRUNDFEST
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioner
Kaiser Steel Corporation

* *Counsel of Record*

Of Counsel:

RICHARD GARY
General Counsel
Kaiser Steel Corporation
300 Lakeside Drive
Oakland, California 94666

February 10, 1981

80-1345

Nos.

Office-Supreme Court, U.S.
FILED
FEB 10 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS, *et al.*,
Respondents.

APPENDICES TO PETITION OF KAISER STEEL CORPORATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT A. HAMMOND, III
A. DOUGLAS MELAMED
LYNN BREGMAN
JOSEPH A. GRUNDFEST

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioner Kaiser Steel Corporation

Of Counsel:

RICHARD GARY, ESQ.
General Counsel
Kaiser Steel Corporation
300 Lakeside Drive
Oakland, California 94666

INDEX OF APPENDICES

	Page
Appendix A—Opinion of the United States Court of Appeals for the District of Columbia Circuit in *Mullins* v. *Kaiser Steel Corp.*, No. 79-1463 (September 17, 1980)	1a
Appendix B—Order (February 28, 1979) and Memorandum Opinion (March 9, 1979) of the United States District Court for the District of Columbia in *Mullins* v. *Kaiser Steel Corp.*, C.A. No. 78-0650	68a
Appendix C—Judgment of Court of Appeals in *Mullins* v. *Kaiser Steel Corp.*, No. 79-1463 (September 17, 1980)	81a
Appendix D—Orders of Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing En Banc (November 12, 1980)	83a
Appendix E—Statutes Involved	85a

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1463

JULIUS MULLINS, *et al.*

v.

KAISER STEEL CORPORATION, APPELLANT

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 78-0650)

Argued December 18, 1979

Decided September 17, 1980

A. Douglas Melamed, with whom *Robert A. Hammond, III* and *John H. Harwood II* were on the brief, for appellant.

Stephen J. Pollak, with whom *Ralph J. Moore, Jr.*, *Wendy S. White*, *E. Calvin Golumbic* and *Walter P. O'Connell* were on the brief, for appellees.

Before: WILKEY and MIKVA, *Circuit Judges*, and FLANNERY *, *United States District Judge* for the District of Columbia.

Opinion for the Court filed by *Circuit Judge* MIKVA.

Dissenting opinion filed by *Circuit Judge* WILKEY.

MIKVA, *Circuit Judge*: This suit was brought against Kaiser Steel Corporation (Kaiser) by the Trustees of the United Mine Workers of America Health and Retirement Funds, seeking payment of contributions due to these funds under the terms of the National Bituminous Coal Wage Agreement of 1974 (1974 Agreement). Kaiser's principal defense was that the contract provision sued on was illegal under both the antitrust prohibitions of the Sherman Act, §§ 1-2, 15 U.S.C. §§ 1-2 (1976), and the "hot cargo" proscriptions of the National Labor Relations Act (NLRA), § 8(e), 29 U.S.C. § 158(e) (1976). Rejecting these defenses, the district court granted summary judgment to the Trustees and awarded them attorneys' fees.[1] For the reasons set forth below, we affirm.

I. THE PURCHASE-OF-COAL CLAUSE

The 1974 Agreement was a collective bargaining agreement between the United Mine Workers of America (UMW) and various coal operators and associations of coal operators, most notably the Bituminous Coal Operators Association (BCOA). As a member of BCOA, Kaiser became an employer-signatory to the 1974 Agreement.

Among the customary provisions of a collective bargaining agreement setting the terms and conditions of

---

* Sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

[1] The district court's opinion is reported at 466 F. Supp. 911 (D.D.C. 1979).

employment, the 1974 Agreement defined the obligations of the parties with respect to the management and funding of various health and retirement trusts established for the benefit of miners. Of particular importance to this litigation is Article XX(d) which provided three ways to measure the employer's obligation to contribute to these funds: first, by the amount of coal produced by the employer for sale or use; second, by the number of hours worked by the employees; and, third, by the amount of coal "procured or acquired" for sale or use for which no contribution had been made. In effect, this third provision—the so-called "purchase-of-coal clause"—required a signatory employer to contribute to the health and retirement funds for each ton of coal purchased from other producers who were not themselves parties to the 1974 Agreement and, hence, did not have a collective bargaining agreement with the UMW. It is the purchase-of-coal clause under which the Trustees now seek payment, and it is the purchase-of-coal clause that Kaiser claims should not be enforced on grounds of illegality.

Previous collective bargaining agreements between the UMW and BCOA had contained a similar provision, except that the predecessor clause required a contribution for coal bought from non-union producers that was double the required contribution for coal that UMW workers had mined. Due to this feature, the earlier clause had been called a "penalty clause" and was the subject of considerable litigation; sometimes the legality of the clause was sustained, but sometimes it was not. *Compare United Mine Workers (Dixie Mining Co.)*, 188 N.L.R.B. 753 (1971) (upholding clause) *with Riverton Coal Co. v. United Mine Workers*, 453 F.2d 1035 (6th Cir.), *cert. denied*, 407 U.S. 915 (1972) (invalidating clause). *See generally International Union, UMW v. NLRB*, 468 F.2d 1139 (D.C. Cir. 1972). Under the current purchase-of-coal clause, the rates of contribution for the coal produced by union and non-union miners are equivalent.

Whatever penalty may have been implicit in the disparity of payments in the earlier clause, that particular defect has been eliminated.

The terms of the 1974 Agreement clearly indicate that the parties were concerned about the legality of the purchase-of-coal clause and about having their bargained-for agreement undone by subsequent legal rulings on that point. Article XX(d)(1), which sets forth the rates of contribution, also provides that the UMW shall have the right to require the parties to meet and negotiate in good faith a replacement for the purchase-of-coal clause if the clause is adjudged to be invalid or unlawful. A similar provision is repeated in the article on severability, which requires renegotiation if the parties are prevented by legal authorities from "implementing or effectuating the economic benefits, including health and retirement fund payments, required by this Agreement." 1974 Agreement, Art. XXIX(b). Both these provisions are set forth in the margin.[2]

---

[2] Article XX(d)(1) of the 1974 Agreement reads as follows, except that the specified rates of contribution have been eliminated:

> During the life of this Agreement, for the periods of time indicated below, each signatory Employer engaged in the production of coal shall contribute to the Trusts established in this Article the amounts specified below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal produced by such Employer for use or for sale, and, in addition, each signatory Employer (including those engaged in the production of coal and those not engaged in the production of coal) shall contribute to the Trusts established in this Article the amounts specified below based on cents per hour worked by each of the Employer's Employees who perform classified work under this Agreement.
>
> . . . .
>
> In addition to the contributions indicated above, during the life of the Agreement, each signatory Employer

In addition to establishing the rates of contribution for the health and retirement funds, the 1974 Agreement required the employers to file monthly reports with the Trustees, setting forth the amount of coal produced

---

shall, for the periods of time indicated below, contribute to the Trusts established in this Article in the amounts shown below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal after production by another operator, procured or acquired by such Employer for use or for sale on which contributions to the appropriate Trusts as provided for in this Article have not been made (amounts shown below include cents per hour worked contributions converted to tonnage equivalents):

. . . .

The parties hereto mutually agree that, if at any time during the term of this Agreement a court or tribunal of competent jurisdiction determines by a final decision that is not appealable that the provision appearing in the paragraph just preceding is invalid or in violation of the National Labor Relations Act, 1947, as amended, or other Federal or state law, the parties shall, at the option of and upon demand by the Union without affecting the integrity of any other provision of this Section or any other provision of the National Bituminous Coal Wage Agreement, meet and engage in good faith negotiations to agree upon a clause to be inserted into this Agreement in replacement of the provision found invalid or unlawful.

Article XXIX(b) of the 1974 Agreement reads as follows:

In the event the parties are restrained or prohibited by any agency or branch of the federal or state government from implementing or effectuating the economic benefits, including health and retirement fund payments, required by this Agreement, either party hereto may, after the imposition of such restraint, give sixty days notice of termination of this Agreement and, thereafter shall meet and discuss and attempt to agree on the basis for a continuation of the Agreement for its term. If no agreement is reached within the 60-day period, the Agreement will terminate.

internally and also the tonnage purchased elsewhere. 1974 Agreement, Art. XX(d)(5). An employer's failure to comply with the reporting requirement was stated in the contract to be an independent contract violation. 1974 Agreement, Art. XX(d)(7).

While the 1974 Agreement was in effect, Kaiser regularly reported and made contributions for coal it had produced; for purchased coal, it did neither. In April, 1978, four months after the 1974 Agreement expired under its terms, the Trustees brought this suit. They alleged that Kaiser had made coal purchases for which contributions were required under the purchase-of-coal clause, a fact Kaiser does not dispute.[3] On that basis, the Trustees sought compliance with the purchase-of-coal clause and payment to the funds accordingly.

The Trustees filed a motion for summary judgment, which was granted by the district court. Kaiser's cross-motion, grounded on several affirmative defenses, was denied. Kaiser has brought the matter here.[4]

II. Kaiser's Illegality Defense

The gist of Kaiser's defense to this suit is that the pertinent contract clause is unenforceable. The argu-

[3] There is a dispute as to when the Trustees first found out about Kaiser's outside purchases. Kaiser insists that the Trustees knew all along about such purchases but declined to bring suit until the Agreement had expired. The Trustees reply that they discovered the problem only in late 1977, when the Agreement was at or near completion. Because this is an appeal from summary judgment, we must assume that Kaiser's version of this disputed fact is correct. We note, however, that the relevance of that fact to the legal issues on appeal is marginal.

[4] In the district court, Kaiser offered affirmative defenses other than its claims of illegality. These other defenses were summarily denied, and Kaiser has not raised them on this appeal.

ment has two branches: first, that the purchase-of-coal provision was, in reality, an anticompetitive penalty, violative of sections 1 and 2 of the Sherman Act; and, second, that the purchase-of-coal provision violated section 8(e) of the NLRA—the so-called "hot-cargo" provision of the labor law, which precludes unions from bargaining for secondary boycotts of non-union goods. For either or both of these reasons, it is argued, the offending contract clause ought not be enforced.

In an appeal from a summary judgment, Kaiser is, of course, entitled to have its version of the facts presumed. *Bishop v. Wood*, 426 U.S. 341, 347 (1976). It is not similarly entitled to have its legal characterization of the disputed contract clause prevail. This is not a case in which a contract's illegality is manifest.[5] *See generally*

---

[5] There is, in fact, good reason to think that the purchase-of-coal clause is consistent with both federal antitrust and federal labor law. Because there is a "strong labor policy favoring the association of employees to eliminate competition over wages and working conditions," courts will sometimes tolerate that "lessening of business competition" which necessarily results from a union's success in standardizing workers' pay. *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616, 622 (1976). In *American Federation of Musicians v. Carroll*, 391 U.S. 99 (1968), for example, the Supreme Court upheld against an antitrust challenge a union regulation requiring all orchestra leaders to charge their customers the same minimum rates, a rule which lessened wage competition among the musicians whom the orchestra leaders hired. Over the years, courts have drawn under the ambit of the labor exemption to the antitrust laws union protective devices having much greater anticompetitive effects than the purchase-of-coal clause here under review. *See Granddad Bread, Inc. v. Continental Baking Co.*, 612 F.2d 1105 (9th Cir. 1979); *California Dump Truck Owners Ass'n v. Associated General Contractors*, 562 F.2d 607 (9th Cir. 1977); *Iodice v. Calabrese*, 512 F.2d 383 (2d Cir. 1975); *Intercontinental Container Transport Corp. v. New York Shipping Ass'n*, 426 F.2d 884 (2d Cir. 1970). In fact, one district court has already held that the purchase-of-coal clause

14 WILLISTON ON CONTRACTS § 1630B (3d ed. 1972) (indicating procedural implications of whether or not contract is manifestly illegal). The narrow issue on appeal, therefore, is not whether an illegal contract clause should

---

itself does not violate the Sherman Act. *United States Steel Corp. v. International Union, UMW*, C.A. No. 75-1966 (D.D.C. Oct. 5, 1977).

Comparable considerations apply to the alleged "hot cargo" violation. The Supreme Court has cautioned against reading the NLRA's prohibitions against secondary boycott activities by unions in a way that would preclude pressuring employers to improve their employees' wages, hours, and working conditions. *National Woodwork Manufacturing Ass'n v. NLRB*, 386 U.S. 612, 643 (1967). It can no longer be doubted that a union does not run afoul of section 8(e) merely by insisting on a "union standards" clause, that is, one which prohibits an employer from subcontracting work to other employers whose economic benefits and working standards are not commensurate with those of the union's collective bargaining agreement. *E.g., Teamsters Local 216 v. NLRB (Bigge-Drayage)*, 520 F.2d 172, 177-78 (D.C. Cir. 1975); *Local 433, Carpenters v. NLRB*, 509 F.2d 447, 452-53 (D.C. Cir. 1974); *Truck Drivers 413 v. NLRB*, 334 F.2d 539, 548 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964); *Orange Belt Dist. Council of Painters v. NLRB*, 328 F.2d 534, 537-39 (D.C. Cir. 1964). Even a clause that, by economic disincentives, serves to dissuade an employer from subcontracting below "union standards" does not necessarily violate section 8(e). *George Ryan Co. v. NLRB*, 609 F.2d 1249, 1254 (7th Cir. 1979). It may well be that the provision Kaiser challenges here is a kind of "union standards" clause and, hence, lawful under section 8(e). In fact, another employer signatory of the 1974 Agreement has previously charged that the purchase-of-coal clause violates section 8(e), but the Board's General Counsel refused to issue a complaint. *International Union, UMW (Consolidated Coal Co.)*, NLRB Case No. 6-CE-17 (March 28, 1979). The implication of this action is that the General Counsel did not regard the claim as "sufficiently meritorious to warrant Board consideration." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 139 (1975). In any event, the issue of the legality of the clause cannot be addressed finally in this lawsuit.

be enforced but rather whether Kaiser's proffered defense of illegality should be entertained. By granting summary judgment for the Trustees, notwithstanding Kaiser's claim that the clause was in two ways illegal, the district court decided that Kaiser was not entitled to interpose the illegality defense. This, we now hold, is correct.[6]

In holding as we do today, we join two other courts of appeals on this question. In *Huge v. Long's Hauling*

---

[6] The dissent contends that a court confronted with the *allegation* of contract illegality can enforce the disputed clause only in two cases: (1) if it concludes that the clause is legal notwithstanding the allegation to the contrary or (2) if it assumes (or concludes) that the clause is illegal as alleged but enforceable nevertheless. Dissenting Opinion at 4-5, —— F.2d at ——. We do not believe, however, that this exhausts the possibilities. As a third alternative, the court can simply refuse to entertain the illegality defense. *See Viacom Int'l, Inc. v. Tandem Prods. Inc.*, 526 F.2d 593, 600 (2d Cir. 1975) (sustaining district judge's "refusal to consider [defendant's] proffered antitrust defense"). Accordingly, we here decide neither that the purchase-of-coal clause was legal nor that it is enforceable notwithstanding its illegality but only that the district court properly declined to entertain the defense.

The dissent also contends that the illegality of the disputed clause must be assumed because this is an appeal from a summary judgment. Dissenting Opinion at 6, 24 —— F.2d at ——. This, however, confuses allegations of fact with legal conclusions drawn from those facts. *See generally* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1368, at 692-93 (1969). Neither case law nor analysis supports the proposition that on appeal from summary judgment, the court must accept as correct the losing party's assertions as to the legality of a disputed contract clause. Moreover, it is not accurate to say—as our dissenting colleague does—that judgment for the Trustees in this case would "enforce a contract clause which *plainly* violates the law." Dissenting opinion at 1, —— F.2d at —— (emphasis added). For even if all of Kaiser's factual allegations are true, the purported illegality of the disputed clause is far from clear. *See* note 5 *supra*.

Co., 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979), the Third Circuit decided a case exactly like the one here on appeal: a suit under the 1974 Agreement by welfare fund trustees to enforce the purchase-of-coal clause met by the defense of illegality under the Sherman Act and section 8(e). The *Huge* court held that neither defense could be interposed. More recently, the Ninth Circuit, in *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979), considered whether a suit by the trustees of a benefit fund should be dismissed on the ground that the provision sued on violated section 8(e) and was, thus, unenforceable. The court held that because the defendants had not first presented their unfair labor practice allegations to the Labor Board, the district court should have decided the trustees' contract claim without reference to the section 8(e) defense. 607 F.2d at 1236.

A. *Antitrust Illegality*

It has never been easy to reconcile the strong command of the antitrust law to fight monopolistic practices with the necessity to preclude windfalls and unjust enrichment of parties to a contract. When confronted in 1909 with a price-fixing scheme "more certain in result, more widespread in its operation, and more evil in its purposes" than any other with which it might be compared, *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 256 (1909) (quoting circuit court opinion, 148 F. 939, 947 (6th Cir. 1906)), it was easier for the Supreme Court to permit an antitrust defense to the plaintiff's contract action than it was to reconcile that result with any other case—before or since. *Compare Continental Wall Paper Co. v. Louis Voight & Sons Co., supra*, (allowing defense) *with Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902) (disallowing defense) *and D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U.S. 165 (1915) (same)

and A. B. Small Co. v. Lamborn & Co., 267 U.S. 248 (1925) (same). Various "tests" were articulated to achieve the reconcilation needed to square antitrust law with basic contract principles. Contracts "collateral" to the unlawful combination could be enforced, but "inherently illegal" agreements could not. *See A. B. Small Co. v. Lamborn & Co., supra*, 267 U.S. at 252; *D. R. Wilder Mfg. Co. v. Corn Products Refining Co., supra*, 236 U.S. at 172-78. The test was as useless as it sounds. In 1959, the Court undertook to give the question a thoroughgoing review.

In *Kelly v. Kosuga*, 358 U.S. 516 (1959), a seller brought suit on a contract for sale of 50 carloads of onions at market price to an onion grower. The contract was part of a larger scheme: the seller-plaintiff, who owned large quantities of onions, would not sell them on the futures market if the defendant and other onion growers would each buy a portion of the seller's stock and similarly withhold them from the market. The effect and intent of the scheme, it was alleged, was to inflate the market price of onions. After taking some deliveries and making some payments, the defendant backed out of the deal, and the seller sued.

The Supreme Court ruled that onions delivered or ready to be delivered had to be paid for by the defendant, notwithstanding his claim that the contract under which the onions were purchased was part of a larger price-fixing scheme which the Sherman Act would deem foul. The Court acknowledged the previous difficulties with the problem, stating:

> As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. This has been notably the case where the plea has been made by a purchaser in an action to recover from him the agreed price of goods sold.

358 U.S. at 518 (footnote omitted). The Court, noting its extreme reluctance to supplement the express remedies provided by the antitrust laws with an additional remedy of contract avoidance, *id.* at 519, restated the narrow limits within which the defense of antitrust illegality would be allowed:

> Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the [Sherman] Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, "of preventing people from getting other people's property for nothing when they purport to be buying it." . . . Supplying a sanction for the violation of the Act, not in terms provided and capricious in its operation . . . is avoided by treating the defense as so confined.

358 U.S. at 520-21 (quoting from Justice Holmes' dissent in *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, *supra*, 212 U.S. at 271) (citations omitted). The pith of *Kelly* is that the illegality of the ends being sought is not the measuring stick for deciding whether the contract should be enforced; only if the enforcement "would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act," can a court refuse to enforce the contract. 358 U.S. at 520.

The difficulty *Kaiser* has in trying to fit into the tiny exception left by *Kelly* is obvious: how can the court be a party to an anticompetitive scheme simply by enforcing a contract which requires employers to make payments into a union's health and retirement funds? If the clause has any purpose other than that, it is, argue the Trustees, only to preserve the work and work standards of UMW workers by counteracting wage competition among coal producers. Despite its anticompetitive effects on the product market, such a purpose is permitted under federal law. *Connell Construction Co.*

v. Plumbers Local 100, 421 U.S. 616, 621-22 (1976). *See generally* note 5 *supra*.

Kaiser's response is to characterize the clause as a penalty designed to enforce a boycott against those who have not signed collective bargaining agreements with the UMW. The clause operates, Kaiser argues, as an economic sanction that induces signatory employers to buy coal only from other signatory employers, and no one else. To persuade the court of this, Kaiser details some of the tortuous history of bargaining between the UMW and the coal producers over the past thirty years and leading to the 1974 Agreement. By inviting the court to take such a journey through the annals of labor history, Kaiser reveals that this case is, in its crucial aspect, just like *Kelly* and every other case in which the party seeking to avoid an allegedly anticompetitive contract delves behind the element of the contract being enforced to the gist of the original bargain. Such an exploration into the purported anticompetitive purpose of a contract clause is precisely what *Kelly* disallows.[7]

The affirmative defense of antitrust illegality does not lie against a contract that is "an intelligible economic transaction in itself." *Kelly*, 358 U.S. at 521. The purchase-of-coal clause, as part of the overall compensation for those covered by the 1974 Agreement, meets this test. The contract has been fully performed by the

[7] At times a court will look to the underlying purpose and effect of a contract to determine whether it is so contrary to public policy that the contract will not be enforced. That is essentially what the Court did in *McMullen v. Hoffman*, 174 U.S. 639, 653-54 (1899), in which enforcement of a written partnership contract was denied because it was part of a larger coal agreement to bid collusively on certain public works projects. But if *Kelly* is to mean anything, it must mean that such an inquiry is not permitted when it is asserted as an affirmative defense that the contract sued on contravenes federal antitrust law.

members of the bargaining unit; they are entitled to the full measure of their bargained-for consideration.[8]

---

[8] We cannot accept the dissent's assertion that the payments at issue here were "unearned" and that Kaiser's workers were paid fully for the work they did even though contractually-required payments were not made. Dissenting Opinion at 14, —— F.2d at ——. The economic rationality and legal propriety of the purchase-of-coal clause is not suspect just because it measures welfare fund contributions by the amount of coal the employer buys from someone else. We know of nothing in reason or federal labor law that requires workers to measure their rate of compensation solely by the number of hours performed or the output of their employer.

In *Walsh v. Schlecht*, 429 U.S. 401 (1977), there was at issue a clause in a collective bargaining agreement that required an employer to contribute to a union employee-benefit fund at a rate of 96 cents per hour for carpentry work done by non-union workers, employed by a subcontractor, which was not itself a signatory of the collective bargaining agreement. The Court enforced the agreement even though the subcontractor's employees were not beneficiaries of the fund and even though the signatory employer had already paid those employees wages at the union scale plus an extra 96 cents per hour as a fringe benefit. The Supreme Court apparently saw no unfairness in this result; we see none here.

It is not unfair to Kaiser that it be required to contribute to the UMW funds after having indirectly paid a comparable amount to other workers, *see* Dissenting Opinion at 14, —— F.2d at ——, for this is exactly what it contracted to do. Neither would enforcing the contract as written create a "windfall" for the Trustees. *See id.* It is in the nature of employee-benefit funds—like all transfer-payment schemes—that benefits to some are funded by contributions from others. And it is often the case that payments to beneficiaries do not perfectly correspond to the amount of work they themselves have done. Attempting to ensure the continued viability of such funds by broadening the base of contribution is often actuarially sound.

If the contributions sought had not already been earned by performance, then the Trustee claim for contract enforcement in this context would have had less force. *See Huge v. Long's*

If onions must be paid for, so too must past services.[9]

B. *Considerations of Equity and Relative Fault*

The hoary maxim that courts will not enforce an illegal bargain is, like many other maxims, only incompletely true. The rule actually employed by the courts is both more complex and more sensitive to nuances of legal relationships. Among the factors which should always be considered in deciding whether to enforce an illegal contract are "the relative guilt of the parties, and the cruelty of the forfeiture involved in a denial of remedy." 6A CORBIN ON CONTRACTS § 1521, at 759 (1962). *Accord*, RESTATEMENT (SECOND) OF CONTRACTS § 420(2) & Comment at 60-61 (Tent. Draft No. 12, 1977). Along these lines, courts will characteristically deny enforcement of a contract on grounds of illegality only if both parties are "*in pari delicto*"; even an illegal

---

Hauling Co., supra, 590 F.2d at 460; *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 773 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965); *Pennington v. United Mine Workers*, 325 F.2d 804, 818 (6th Cir. 1963), *cert. denied*, 381 U.S. 749 (1965). That, however, is not this case.

[9] To distinguish this case from *Kelly*, the dissent propounds an analogy between the purchase-of-coal here and the nondelivery agreement alluded to in Kelly. Dissenting Opinion at 10-11, —— F.2d at ——. That analogy, however, is fundamentally misconceived.

In *Kelly* the Court distinguished the nondelivery agreement (*i.e.*, the agreement to withhold onions from the market) from the contract for the sale of onions. The former, it said, could not be enforced if violative of the antitrust law. 358 U.S. at 521. The latter would be enforced even though it was allegedly in furtherance of the monopolistic scheme. The analogue to the nondelivery agreement in this case is *not* the purchase-of-coal clause, as the dissent asserts, but rather the alleged agreement to boycott non-UMW coal producers. An agreement like that between a union and group of employers is violative of the antitrust law, *see United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and is unenforceable

contract can be enforced if doing so protects innocent plaintiffs or plaintiffs comparatively more innocent that the defendant, especially when the contract on the plaintiff's side has been fully performed. 6A CORBIN ON CONTRACTS, *supra*, § 1534, at 818-820, § 1536, at 823-24; 3 POMEROY'S EQUITY JURISPRUDENCE § 942 (1941); 14 WILLISTON ON CONTRACTS, *supra*, § 1630A, at 18-26, § 1631, at 34-38. This is especially so for plaintiffs who serve as representatives for persons wholly innocent of wrongdoing. *See In re Leasing Consultants, Inc.*, 592 F.2d 103, 110-11 (2d Cir. 1979); 15 WILLISTON ON CONTRACTS, *supra*, § 1790.

These general principles apply with equal or greater force to cases in which the basis of the illegality defense is an alleged violation of the Sherman Act. In *Viacom International, Inc.* v. *Tandem Productions, Inc.*, 526 F.2d 593 (2d Cir. 1975), a broadcast network had contracted with the producer of a television series for broadcast, syndication, and distribution rights; it then assigned its distribution rights to Viacom. When Viacom sued for a declaration of its acquired rights, the producer interposed the defense that the underlying contract was violative of the antitrust law. In expressing the opinion of the court, Judge Lumbard emphasized the

---

under the *Kelly* rule. In contrast, the purchase-of-coal clause (like the sale contract for onions) is enforceable under *Kelly* even though its alleged purpose and effect was to further an illegal boycott plan.

The dissent seems to be of the view that there are no circumstances under which the purchase-of-coal clause is a "penalty" on its face simply because "nonunion parties receive no benefits" from its operation. *See* Dissenting Opinion at 12, —— F.2d at ——. We disagree. *See* note 8 *supra*. On its face, and apart from any consideration of its purpose and effect in a particular context, the purchase-of-coal clause "constitutes an intelligible economic transaction in itself." *Kelly*, 358 U.S. at 521. Accordingly, *Kelly* requires that the illegality defense be disallowed.

undesirability of allowing the producer to convert what was, on its face, a simple contract action into one encrusted with the complexities of an antitrust suit, especially when the party to suffer most from so protracting the litigation was innocent of the alleged illegality. 526 F.2d at 599-600. For that reason, it was proper, Judge Lumbard said, "to limit [the producer] to any cause of action it might have against [the broadcast network] rather than to force Viacom to meet the vagaries of an antitrust defense action." *Id.* at 600. The district court's refusal to consider the proffered antitrust defense was, accordingly, affirmed.

As the court in *Viacom* shielded the assignee from the alleged antitrust violations of its assignor, so must this court shield the Tustees, and with even more reason. As a rule, third-party beneficiaries, like the Trustees here, are subject to the contract defenses of nonperforming promisors. But the Trustees of a union welfare fund are sometimes immune from contract defenses that could be asserted against the union itself because such a rule better serves the concern of federal labor policy to protect union members and their families from the actionable wrongs of their union representatives. *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 468-71 (1960). We see no reason for not applying that exemption here.

Not only the special status of the Trustees, but also the questionable conduct of Kaiser must be taken into account. We cannot ignore that Kaiser's way of handling this matter manifests an effort to confound the collective bargaining process and manipulate the judicial process instead.

The bargaining history of this contract and its predecessors, as well as the clear language of the 1974 Agreement, shows a concern about the legality of the purchase-of-coal clause. If the clause were adjudged to be illegal or invalid, a renegotiation plan was to go into effect

under the terms of the contract. The UMW had an unambiguous contract right to review the bidding if this key clause were stricken. Kaiser does not attack the legality of these contract provisions. Neither does Kaiser challenge the legality of its affirmative obligation under the Agreement to report to the Trustees any purchases of non-UMW coal. Though the Trustees supplied Kaiser with reporting forms that provided for and invited such information, Kaiser failed to disclose it. Kaiser provided information about coal it produced, but left the spaces for purchased coal blank. Even if the purchase-of-coal clause were unlawful, there is no reason to suppose that the reporting provision would fail as well. If Kaiser truly believed the purchase-of-coal clause would not withstand judicial scrutiny, it did not have to wait for others to act. It could have brought an action for declaratory judgment against the UMW. But when another signatory employer brought such a suit,[10] Kaiser stood pat. It was, in sum, Kaiser's choice to adopt a strategy of ignoring its contractual obligations to the Trustees and of not pursuing its opportunities for a timely and direct adjudication of its rights. This whole pattern of conduct betokens such unclean hands that it weighs against permitting Kaiser to raise the illegality defense.[11]

Kaiser's response is that the Trustees' conduct was not beyond reproach. The Trustees knew, Kaiser as-

---

[10] *United States Steel Corp. v. International Union, UMW*, C.A. No. 75-1966 (D.D.C., filed Nov. 24, 1975, decided Oct. 5, 1977) (judgment that Sherman Act not violated by purchase-of-coal clause).

[11] Ordinarily, one thinks of the doctrine of unclean hands as the sin of the plaintiff—he who "*comes to court* with unclean hands." But the doctrine can also apply when the plaintiff establishes a right at law and the defendant attempts to interpose a defense which, like the defense of illegality, is overlaid with equitable considerations. *See* H. McCLINTOCK, HANDBOOK OF PRINCIPLES OF EQUITY 65 (1948).

serts, all about its outside coal purchases, but they deliberately let the dispute lie fallow until after the Agreement had run its course. Assuming that to be true, it does not affect our view of the central issue on this appeal. The basic conflict here was between Kaiser and the UMW, each attempting to maneuver into a more advantageous position from which to do legal and economic combat. Whatever maneuvering the Trustees might have done was only to stay out of the crossfire. There is nothing wrong with a party's waiting to litigate until all the money it is owed has come due. But using the courts in an effort to circumvent what one has freely bargained for is conduct of a wholly different sort.

Finally, by raising the legality issue only now, after the 1974 Agreement has expired, Kaiser can be protected from the alleged penalty only at the expense of the fund beneficiaries. If Kaiser had raised a timely challenge to the purchase-of-coal clause and won, the union (as guaranteed in the contract) would have had a chance to bargain for a lawful substitute. It might have succeeded in obtaining an increased rate of contribution for coal mined by an employer's own workers to offset what was lost by the invalidation (*ex hypothesis*) of the disputed clause. This would have protected both Kaiser and the beneficiaries from the union's alleged illegal scheme. Now that possibility is lost.

C. *The Labor Law Illegality*

The second branch of Kaiser's illegality defense fares no better than the first. Kaiser alleges that the UMW insisted on the purchase-of-coal provision to assist it in organizing the workers of a coal producer from whom Kaiser bought coal. If accepted as true, that might convert the challenged provision into a "hot cargo" clause. *See National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 644-45 (1967). *But see* note 5 *supra*. Even so, section 8(e), like its counterparts in the Sherman Act,

cannot be used to create a windfall result. In enacting section 8(e), Congress did not intend to afford employers the subtle form of self-help Kaiser here claims is its right.

Congress added section 8(e) to the labor law as part of a wider effort to strengthen and clarify the law's existing prohibitions against "secondary boycotts" by labor organizations. Before section 8(e) was passed, a labor union could not, by strike or similar means, coerce an employer into boycotting another employer with whom the union had a dispute, but the union could lawfully exact from employers contractual promises to comply "voluntarily" with such boycotts. *National Woodwork Mfrs. Ass'n v. NLRB*, *supra*, 386 U.S. at 634. For Congress, this was a loophole in the law, which section 8(e) was designed to close. *Id.* But in taking this tack, Congress well knew the disruptive potential of judicially created remedies for labor disputes, especially where labor law and antitrust law overlap. Accordingly, Congress carefully defined the remedies that might be sought for violations of section 8(e) and apportioned those remedies to distinct tribunals, each with its own special competence.

Section 8(e) opens with the language that "[i]t shall be an unfair labor practice" for a union and an employer to agree to a "hot cargo" clause. As with other unfair labor practices, the primary enforcement mechanism for section 8(e) violations is through the Labor Board. Any party aggrieved by a "hot cargo" clause may file a charge with the Board that section 8(e) has been violated. The Board is required to give expeditious consideration to that charge and, in a proper case, to seek injunctive relief in district court. NLRA § 10(*l*), 29 U.S.C. § 160(*l*) (1976). In addition, section 303 of the Labor Movement Relations Act of 1947 (LMRA), 29 U.S.C. § 187 (1976), provides a make-whole remedy in

the form of an action for damages, but not injunctive relief, in the district court. This remedy is not available for violations of section 8(e) as such but only for violations of section 8(b)(4), 29 U.S.C. § 158(b)(4) (1976), which makes it an unfair labor practice for a union to engage in a strike or similar conduct where an object thereof is, *inter alia*, to induce an employer to agree to a "hot cargo" clause. Any person "injured in his business or property" by such conduct may sue. Even here, however, limits are imposed. First, the right to damages comes into play only when a union has struck or otherwise coerced the employer into accepting the "hot cargo" clause; it is the coercion and not the clause itself that is the gravamen of this claim. Accordingly, an employer who voluntarily accedes to a "hot cargo" clause—"coerced" only by the desire to avoid an economic strike—has no right to sue for damages but is relegated to an unfair labor practices remedy before the Board. *See Atchison, Topeka & Santa Fe Ry. v. Local 70, Teamsters*, 511 F.2d 1193 (9th Cir. 1975). Second, even those who may sue are limited to the recovery of "actual, compensatory damages," *Teamsters Union v. Morton*, 377 U.S. 252, 260 (1964), not the treble damages that are available under the antitrust law for comparable forms of economic manipulation. *See generally Connell Construction Co. v. Plumbers Local 100, supra*, 421 U.S. at 639-46, 650-54 (Stewart, J., dissenting) (detailing legislative history). Third, recovery in a section 303 damages suit may be obtained only from the union as an entity; the financial resources of individual union members are expressly shielded from judgment. *See* LMRA § 303(b), 29 U.S.C. § 187(b) (1976) (incorporating by reference procedural limitations of LMRA § 301(b), 29 U.S.C. § 185(b) (1976)). When Congress has spoken so directly on the remedies to be provided for statutory violations, it is not for the courts to add remedies of their own. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-20 (1979).

To permit an employer to assert a section 8(e) defense in a suit like this would add the remedy of contract avoidance to the other forms of relief which the statute expressly provides. Kaiser argues that this result is mandated by the language of section 8(e) itself, which states that any collective bargaining agreement containing a "hot cargo" clause "shall be to such extent unenforcible [*sic*] and void." This language, Kaiser contends, implies that employers are permitted to sign agreements that violate section 8(e) and then freely ignore what they have signed, defending the breach on grounds of illegality.

The existence of the statutory directive that "hot cargo" clauses are "unenforceable and void" surely must be taken into account. But the existence of such a statutory declaration does not imply that contracts of a certain sort can never be enforced under any circumstances. *See Mills v. Auto-Lite Corp.*, 396 U.S. 375, 387-88 (1970); *Occidental Life Ins. Co. v. Pat Ryan & Associates*, 496 F.2d 1255, 1265-67 (4th Cir.), *cert. denied*, 419 U.S. 1023 (1974) (upholding payment of contract price notwithstanding that contract violated securities law and statute stated that all such contracts are void). *See generally* 14 WILLISTON ON CONTRACTS, *supra*, § 1630A, at 25-26, § 1631A, at 48. The reading which Kaiser suggests for section 8(e)'s "unenforceable and void" language would add to the remedies Congress expressly provided an independent remedy available at all times and against all parties. Because this remedy would exceed what is required to give meaning to the statutory language and would impede the effective operation of the labor law, we cannot agree that it is what Congress had in mind.

As noted above, the primary enforcement mechanism for section 8(e) violations is an unfair labor practice proceeding before the Labor Board, which may lead to a cease-and-desist order from the Board or a Board-initiated injunction from the district court. Other provisions of

the NLRA further restrict a union from securing indirectly the benefits of a "hot cargo" clause. For example, even when "hot cargo" clauses were legal, a union could not conduct a secondary boycott strike under the guise that it was merely striking to enforce the previously negotiated "hot cargo" provision of its collective bargaining agreement. *See NLRB v. Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 515-17 (1977). In addition, when section 8(e) is read in conjunction with section 8(b)(4)(A), a union is prevented from using its economic power to compel an employer to agree in advance to honor a secondary boycott the union might impose at a later time. In this context, the "unenforceable and void" language simply provides a third prophylactic device, preventing a union from obtaining specific performance of a "hot cargo" clause should a union and an employer, unlawfully, agree to one. In short, by making "hot cargo" clauses "unenforceable and void," Congress intended to prevent unions from compelling through judicial enforcement of collective bargaining agreements the very conduct that the union could not compel by its economic might. Whether Congress meant anything more than that is not apparent from the words it used.

Allowing Kaiser to assert a section 8(e) defense in this suit would not only expand its remedies beyond what is necessary to give full effect to the language of the Act but would also interfere with protection to others that the labor law affords. In this case, the Trustees have claimed jurisdiction under both section 301 of the LMRA, authorizing court enforcement of collective bargaining agreements, and section 502 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132 (1976), similarly intended to enforce pension obligations. Suits like the one the Trustees bring here are, in the full gamut of modern litigation, relatively simple affairs. At most they require the court to determine what a particular contract provision means and whether its obliga-

tions have been fulfilled. In contrast, a secondary boycott case is, characteristically, more intricate and somewhat arcane. To decide whether a particular contract clause violates section 8(e), it must be determined whether, "under all the surrounding circumstances," the clause is "addressed to the labor relations of the contracting employer *vis-à-vis* his own employees," rather than being "tactically calculated to satisfy union objectives elsewhere." *National Woodwork Mfrs. Ass'n v. NLRB, supra,* 386 U.S. at 644-45. The Supreme Court may have understated when it said, "[t]his will not always be an easy test to apply." *Id. See NLRB v. International Longshoremen's Ass'n,* 100 S.Ct. 2305 (1980). Thus, if Kaiser were allowed to go forward with its section 8(e) claim as an affirmative defense, it could interject into an otherwise simple contract-enforcement suit complex and disputed questions about the conduct and motives of those who negotiated the underlying agreement. This would be unfair to the Trustees and would unwisely interfere with the orderly remedial processes contemplated by the labor law. *Cf. Viacom, supra,* 526 F.2d at 599-600. This court would be loathe to foster such a result.

Finally, this court's interpretation of section 8(e) must be informed by the overall scheme of national labor policy. A crucial aspect of that scheme is that the National Labor Relations Board is vested with primary jurisdiction for determining what is or is not an unfair labor practice. As the Supreme Court said in *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 244-45 (1959), "courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." *Accord, Garner v. Teamsters Union,* 346 U.S. 485, 490-91 (1953).

The evolution of the body of law committing certain labor law questions to the primary jurisdiction of a

national body of experts has not been free of complications. But the desirability of such a doctrine has hardly been questioned by either policymakers or the courts. As Justice Harlan said in *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 288 (1971):

> The rationale for pre-emption, then, rests in large measure upon our determination that when it set down a federal labor policy Congress plainly meant to do more than simply to alter the then-prevailing substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body rather than the federalized judicial system.

The objective of such an approach was "to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter." *Id.* at 285-86. Thus, the primary jurisdiction doctrine carefully defines the coordinate responsibilities of the Labor Board and the federal courts in enforcing Congress' prohibition of unfair labor practices. Because it is such a basic feature of our labor law, it is not to be lightly disturbed, especially without a clear congressional mandate for change. *Id.* at 302. Exceptions have been and will continue to be made, but they are exceptions which are accordant with the grand scheme envisioned by Congress.

Congress altered the basic scheme when it enacted section 301 of the LMRA, authorizing suits in federal district court to enforce collective bargaining agreements. Consonant with that change, federal courts have independent jurisdiction to decide cases alleging the breach of collective bargaining agreements, even though that very breach may also be an unfair labor practice. *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 266-68

(1964); *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). But the court's statutory authority to adjudicate contract disputes under section 301 does not imply that it has jurisdiction to entertain every conceivable affirmative defense.

If an employer were allowed to interpose the section 8(e) defense in any suit to enforce a collective bargaining agreement, there would be nothing left of the Board's primary jurisdiction for section 8(e) cases. An employer could effectively circumvent the authority of the Board simply by doing what Kaiser suggests: freely ignore an agreement it signed and then defend in an action to enforce it on the ground that it violated section 8(e) and could not be enforced. To allow that result would undermine the enforcement scheme Congress endeavored to devise and would be inconsistent with the principle of primary jurisdiction that has so long been a part of federal labor law.

We do not accept the argument that the Supreme Court's decision in *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975), signals a retreat from the primary jurisdiction doctrine where section 8(e) violations are concerned. *Connell* does not hold, nor does it imply, that employers may interpose the alleged violation of section 8(e) as a defense in a contract enforcement suit even though they have not previously pursued their remedies before the Labor Board.

In *Connell*, an employer filed suit complaining that an agreement it had signed under the duress of a union strike violated the Sherman Act. The union sought to interpose a defense under section 8(e), claiming that its language overrode the earlier-enacted Sherman Act. To its more general defense that section 8(e) shields unions generally from antitrust liability, the union added a more particular variation. The union asserted that as a construction union, it was shielded from antitrust li-

ability because, in its view, the so-called construction-industry proviso of section 8(e) specifically authorized the kind of agreement being challenged in that suit. The Court in *Connell* rejected both of these claims to antitrust immunity.

In deciding that the construction-industry proviso did not apply to the agreement under consideration, the Court remarked that "the federal courts *may* decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws." 421 U.S. at 626 (emphasis added) (footnote omitted). Although *Connell* clearly says that a federal court *may* decide "collateral" labor law issues in certain cases, it does not say that such issues must always, or even should always, be addressed. The overriding concern is still whether the exercise of judicial jurisdiction is consistent with the national labor policy ordained by Congress.

In *Connell*, it must be noted, the union was not claiming that an unfair labor practice had been committed but that the agreement sued on was explicitly allowed by the construction-industry proviso to section 8(e). That question could not have been addressed by the Labor Board because it does not have jurisdiction to decide the scope of section 8(e) absent a charge that an unfair labor practice has occurred. As a consequence, there was no mechanism for the administrative adjudication of the "collateral" labor law issue which the Court undertook to resolve. Similar factors were at play in *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 687 (1967) (opinion of White, J.), the primary case on which the *Connell* Court relied for the proposition that collateral labor law issues may be decided. In contrast, in the case now under review, there was "an available procedure for obtaining a Board determination," *Meat Cutters v. Jewel Tea Co., supra*, 381 U.S. at 687, of precisely the labor law issue which Kaiser seeks to interpose. Kaiser

could have filed a charge with the Board alleging a violation of section 8(e), but it did not. If Kaiser had been victimized by the UMW, that would have been its appropriate means of redress. But the district court does not acquire jurisdiction to decide in the first instance whether an unfair labor practice has been committed just because the party alleging it chose to forgo the administrative remedy Congress expressly provided for the illegality it defined.[12]

---

[12] Kaiser argues that the contrary is indicated by a comment of Justice Stewart in *Connell*. So, too, does the dissent. Dissenting Opinion at 29-30, — —F.2d at ——. But the comment referred to was made in a footnote to Justice Stewart's dissent in that case, 421 U.S. at 649 n.9, and is not controlling here. More important, the comment, when read in context, is not inconsistent with the view expressed in this opinion.

Justice Stewart addresses in his footnote the legal consequences that befall an employer who signs voluntarily a "hot cargo" clause. He notes that if the employer complies with the clause and refuses to deal with another business, that business may have a valid antitrust action against the boycotting or "neutral" employer. This possible liability for damages can be avoided, Justice Stewart says, simply by the employer's refusal to comply with the "hot cargo" clause. He then concludes, "Since § 8(e) provides that any prohibited agreement is 'unenforceable and void,' any union effort to invoke legal processes to compel the neutral employer to comply with his purely voluntary agreement would obviously be unavailing." 421 U.S. at 649 n.9.

Taken in context, all this means is that the court will not compel an employer to engage in conduct violative of the antitrust law by granting specific performance of an illegal, "hot cargo" clause. *See* pp. [17-18], *supra*. However, the case here under review is not a suit for specific performance but for payment of a sum owing and due. A court order compelling Kaiser to make payments to the Trustees now that the 1974 Agreement has expired would not force Kaiser to do anything prohibited by either section 8(e) or the Sherman Act and would not subject Kaiser to antitrust liability from someone else. The problem Justice Stewart was addressing in his footnote does not arise.

In concluding that the "unenforcible and void" language of the statute does not permit a party to interpose an alleged violation of section 8(e) as an affirmative defense to a contract enforcement suit, we have relied on the language of the entire statutory section, its interrelationship with other statutory provisions, and its role in the overall statutory scheme. A statutory construction thus derived is preferred unless the legislative history of the disputed provision clearly shows that Congress meant something else. *See Transamerica Mortgage Advisors, Inc. v. Lewis, supra*, 444 U.S. at 20; *National Small Shipments Conference, Inc. v. CAB*, No. 78-2163, slip op. at 17 (D.C. Cir. Feb. 11, 1980). We have carefully reviewed the legislative history of the "unenforceable and void" language of section 8(e) and are satisfied that it does not indicate a contrary intent.[13]

---

[13] The "unenforceable and void" language was first introduced during floor debate by Senator Smathers in an amendment that would also have brought section 8(e) violations within the mandatory injunction provisions of section 10(*l*). 105 CONG. REC. 6033 (daily ed. Apr. 25, 1959), *reprinted in* II LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1242 (1959) [hereinafter cited as LEGIS. HIST.] Senator Smathers' remarks clearly show that it was his understanding that the policing mechanism for section 8(e) violations would be the mandatory injunction provisions of section 10(*l*). *See id.* Remarks by Senator Goldwater some weeks later reflect a similar understanding. 105 CONG. REC. 9118 (col. 2) (daily ed. June 8, 1959), *reprinted in* II LEGIS. HIST. at 1290. In the course of debate, several legislators remarked that what is now section 8(e) would make "hot cargo" clauses "unenforcible and void," but very rarely did these legislators clearly articulate what they thought that meant.

The most substantial support for the view that "hot cargo" illegality might be raised as an affirmative defense in a contract enforcement suit is found in a statement by Senator Goldwater, in which he said:

> [Section 8(e)] means that ["hot cargo"] contractual clauses are per se illegal. It is unlawful for either party

For the foregoing reasons we conclude that an alleged violation of section 8(e) may not be raised as a defense in a suit under section 301 to enforce the underlying collective bargaining agreement by a party that has abstained from first pursuing its remedies before the Labor Board.

D. *Availability of Other Remedies*

Our decision today does not eliminate Kaiser's right to a remedy but only its asserted right to a remedy at a time, in a forum, and against a party of its choosing. Kaiser has had adequate opportunities to test its claim that the union overreached in obtaining the purchase-of-coal clause in the 1974 Agreement.

> even to execute such an agreement, to insist that the other party bargain about or enter into it, to use any form of coercion or restraint—economic or otherwise—to compel the other party to enter into it or to live up to it even if his refusal to do so is in breach of a voluntary agreement to abide by the agreement, and finally, such breach does not constitute a good cause of action in a suit at law to recover damages for the breach or to secure specific performance of the agreement.

105 CONG. REC. A8523 (col. 3) (daily ed. Oct. 2, 1959), *reprinted in* II LEGIS. HIST. at 1857. This statement was included in an "extension of remarks"—not something actually said in the course of legislative debate but rather a statement appended to the official record at some other time—after the bill had already been signed into law. The statement is not inconsistent with our construction of section 8(e). Whether a union can obtain specific performance, or even damages for breach, on a contract that is still executory and clearly violative of section 8(e) is a different question from whether the trustees of a welfare fund may recover money due on a contract already fully performed on the union side and only arguably violative of section 8(e). Accordingly, Senator Goldwater's statement is not controlling evidence of congressional intent as to the meaning of the "unenforceable and void" language of section 8(e), as that language relates to the issue on this appeal.

If the clause violated the provisions of section 8(e), Kaiser could have sought the processes of the Board to right the wrong. After a charge that the purchase-of-coal clause violated section 8(e) had been made, the Board's General Counsel would be responsible for determining whether to issue a complaint and thus commence the Board's process of adjudication. *See* NLRA § 10(b), 29 U.S.C. § 160(b) (1976). That the General Counsel has reviewable discretion to refuse to issue an unfair labor practice complaint, *see Associated Builders & Contractors v. Irving*, 610 F.2d 1221, 1226 (4th Cir. 1979); *National Alliance of Postal Employees v. Klassen*, 514 F.2d 189, 197 (D.C. Cir.), *cert. denied*, 423 U.S. 1037 (1975), is itself further proof that Congress wanted decisions of this sort to be made initially by the national repository of labor expertise. *See generally Associated Builders & Contractors v. Irving*, *supra*, 610 F.2d at 1224-26. To allow an employer to bypass the Board by stating its objection for the first time in court as a defense to a lawsuit by other parties on other issues would destroy the congressional plan.

The same is true about Kaiser's claims under the Sherman Act. If Kaiser had cause, that Act gave it the right to sue the union directly, and seek damages threefold for what it had suffered. Presumably, such a claim would encompass any improper amounts paid the Trustees. In any event, such a suit would pit the proper parties against each other in a contest raising squarely the competing considerations of antitrust policy and labor law. That is a dispute that courts can and would resolve.

It is an entirely different question whether Kaiser should have still another means of redress, especially a remedy like the illegality defense which is not favored by the law. As the Supreme Court has said:

> It has been often stated in similar cases that the defence [of illegality] is a very dishonest one, and it lies ill in the mouth of the defendant to allege it,

> and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions.

McMullin v. Hoffman, 174 U.S. 639, 669 (1899), *quoted in Kelly v. Kosuga*, *supra*, 358 U.S. at 519. When other avenues are open, the defense is even more unseemly. "Unless the public interest requires, we are reluctant to nullify a contract which has been executed, and this is especially true where the parties have other remedies at their disposal *which will produce an equitable result.*" *Occidental Life Ins. Co. v. Pat Ryan & Associates, Inc.*, *supra*, 496 F.2d at 1267 (emphasis in original) (interpreting Securities Exchange Act § 29(b), 15 U.S.C. § 78cc(b) (1976), which declares that contracts in violation of that act "shall be void"). In fact, the defense of contract illegality should ordinarily be allowed only when the public interest served by permitting the defense clearly outweighs the public interests that militate in favor of contract enforcement. *See A. C. Frost & Co. v. Coeur D'Alene Mines Corp.*, 312 U.S. 38, 44 (1941); *In re Leasing Consultants, Inc.*, *supra*, 592 F.2d at 110; *California Pacific Bank v. Small Business Adm'n*, 557 F.2d 218, 224 (9th Cir. 1977); 3 POMEROY'S EQUITY JURISPRUDENCE, *supra*, § 941; *cf. Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 752-54 (1947). When the contract in question is a collective bargaining agreement, those countervailing interests are especially acute.

A collective bargaining agreement is more than a contract between private parties; it is a charter for the "system of industrial self-government" envisioned by federal labor law. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960). Recognizing this, the courts have not been reluctant to refashion more general principles of contract law when they conflict with the overriding goals of national labor policy.

John Wiley & Sons v. Livingston, 376 U.S. 543, 550 (1964); *United Steelworkers v. Warrior & Gulf Navigation Co., supra*, 363 U.S. at 582-83; *Lewis v. Benedict Coal Corp., supra*, 361 U.S. at 467-71. At times, those goals require that otherwise lawful prerogatives must "be balanced by some protection to the employees from a sudden change in the employment relationship." *John Wiley & Sons v. Livingston, supra*, 376 U.S. at 549. At other times, access to a judicial remedy is made conditional on the parties' prior resort to other remedial processes, so as to better achieve the "stabilizing influence of the collective bargaining contract." *Drake Bakeries Inc. v. Local 50, Bakery Workers*, 370 U.S. 254, 263-64 (1962).

Those same considerations are applicable here. The twin goals of protecting the integrity of the collective bargaining agreement and of fostering the orderly administration of federal labor law would be weakened if an employer could simply ignore putatively unlawful provisions of a collective bargaining agreement and then challenge the lawfulness of those provisions as an affirmative defense after the contract expired. Given the facts of this case, it would better serve both equity and national labor policy if the Trustees were allowed to recover the required contributions to the welfare funds unimpeded by Kaiser's belated assertion of illegality.

III. Attorneys' Fees

The district court awarded attorneys' fees to the Trustees. The parties dispute whether the district court had authority to make such an award.

The Trustees argue that jurisdiction of this section is conferred by both section 301 of the LMRA and section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3) (1976). For actions brought under the latter, the district court has explicit statutory authority to award such attorneys'

fees as, in its discretion, are appropriate. ERISA § 502 (g), 29 U.S.C. § 1132(g). Kaiser replies that the gist of this action is the alleged violation of a collective bargaining agreement—properly maintainable under section 301 but not under section 502 of ERISA. It is true that as a general rule, attorneys' fees may not be awarded in a section 301 suit unless there is a showing of "bad faith." *See National Ass'n of Letter Carriers v. United States Postal Serv.*, 590 F.2d 1171, 1176 & n.5 (D.C. Cir. 1978); *Cronin v. Sears, Roebuck & Co.*, 588 F.2d 616, 619-20 (8th Cir. 1978). *But see Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1116-17 (9th Cir. 1979). We do not believe, however, that section 301 of the LMRA and section 502 of ERISA are so surgically discrete that an action to compel welfare fund contributions required by the terms of a collective bargaining agreement cannot be maintained under both sections. In numerous cases, both within this circuit and elsewhere, district courts have allowed suits like this to proceed under both LMRA and ERISA, and have awarded attorneys' fees pursuant to ERISA § 502(g), 29 U.S.C. § 1132(g).[14] We conclude, therefore, that the district court had jurisdiction of this action under section 502 of ERISA, as well as under section 301 of LMRA. We further conclude that the district court did not abuse its discretion in awarding attorneys' fees to the Trustees.

The judgment of the district court is

Affirmed.

---

[14] *See, e.g., Mullins v. Reitz Coal Co.*, C.A. No. 78-0715 (D.D.C. Mar. 23, 1979); *Huge v. Reid*, 468 F. Supp. 1024 (N.D. Ala. 1979); *Huge v. Maximeadows Mining Co.*, 459 F. Supp. 267 (N.D. Ala. 1978); *Bugher v. Southland Fabricators, Inc.*, 452 F. Supp. 870 (W.D. La. 1978); *Sheet Metal Workers Pension Fund v. Young's Roofing, Inc.*, C.A. No. 77-1849 (D.D.C. May 3, 1978); *Huge v. Overly*, 445 F. Supp. 946 (W.D. Pa. 1978); *IAM National Pension Fund v. Ward La France Truck Corp.*, C.A. 77-1206 (D.D.C. Feb. 1, 1978); *Bugher v. Frash*, 98 L.R.R.M. 3010 (S.D. Ind. 1977).

WILKEY, *Circuit Judge*, dissenting: This appeal raises the question whether a purchase-of-coal penalty clause may be enforced against appellant steel company even if the clause violates antitrust and labor laws. The district court held that the legality of the clause was irrelevant and struck the illegality defense. My colleagues agree with the analysis of the district court. Since I know of no reason in law or logic why any court should enforce a contract clause which plainly violates the law specifically designed to prohibit such clauses, I dissent. Necessarily, the district court's award of attorney's fees to appellee trustees cannot stand.

I. BACKGROUND

Since the 1940's the United Mine Workers of America (UMWA) has sought through various clauses in collective bargaining agreements to encourage signatories to purchase coal from other signatories only. In the 1940's and 1950's some agreements included a "no subcontracting clause," prohibiting subcontracting by UMWA operators for the mining and loading of coal.[1] The 1958 agreement included a "protective wage clause" prohibiting the purchase of coal from operators providing wages and benefits below those paid under the UMWA contract.[2] In 1964 the purchase-of-coal clause was included in the agreement, calling for the payment to the UMWA health and pension fund of $.80 for each ton of coal purchased from a nonsignatory.[3] Kaiser Steel submits that the

---

[1] *See, e.g.*, Kanawha District Agreement at 34-35 (22 Aug. 1941), *reprinted in* Joint Appendix (J.A.) at 483.

[2] National Bituminous Coal Wage Agreement of 1950 as Amended, Effective 1 December 1958, at 2-3, *reprinted in* J.A. at 485.

[3] National Bituminous Coal Wage Agreement of 1950 as Amended, Effective 2 April 1964, at 2, *reprinted in* J.A. at 589.

purpose of such clauses was and is to aid the UMWA in organizing the nonsignatories;[4] the trustees submit that the purpose of the clauses is to deal with the threat to the work and work standards of UMWA employees presented by the purchase of cheap coal by signatories from producers having subunion wages, fringe benefits, and working conditions.[5]

Until 1971 the UMWA agreements left the steel companies free to purchase non-UMWA coal for use in their manufacture of steel.[6] But beginning in 1971, the purchase-of-coal penalty clause was included in the UMWA agreements with the steel companies.[7] The clause here challenged, part of the 1974 agreement, required signatories to contribute to the union health and pension funds $1.182 for each ton of coal purchased from nonsignatories in 1974, $1.456 in 1976, and $1.55 in 1977.[8] Thus, in addition to the amounts that UMWA operators must contribute to those funds based on coal tonnage actually produced and hours worked by UMWA members, the contract requires contributions for each ton of coal purchased from *non*signatories.

From the time the agreement was signed, Kaiser Steel refused to make any penalty payments or even to report purchases of coal.[9] Kaiser submits that the trustees of

---

[4] Brief for Appellant at 4.

[5] Brief for Appellees at 9.

[6] *See* Letter from Charles M. Heath to W. A. Boyle (21 Oct. 1968), *reprinted in* J.A. at 492; Affidavit of S. W. Zanolli at 6 (18 Oct. 1978), *reprinted in* J.A. at 479.

[7] *See* Affidavit of S. W. Zanolli at 6 (18 Oct. 1978), *reprinted in* J.A. at 479.

[8] National Bituminous Coal Wage Agreement of 1974 at 28, *reprinted in* J.A. at 491.

[9] Kaiser's remittance forms during the period at issue are *reprinted in* J.A. at 192-275.

the UMWA funds must have known since at least 1971 about Kaiser's purchases from Mid-Continent (a nonsignatory).[10] The trustees say they did not know that Kaiser was purchasing coal from nonsignatories until near the end of the 1974 contract period.[11] After the contract expired the trustees sued Kaiser Steel to obtain the contributions called for by the purchase-of-coal clause agreement.

In the district court Kaiser defended the action on the basis that the purchase-of-coal clause violated the Sherman Act[12] and section 8(e) of the Labor-Management Relations Act.[13] On motion for summary judgment, the district court ruled that the claimed illegality of the clause was not a valid defense in this action. Allegedly following *Kelly* v. *Kosuga*,[14] the court rejected the antitrust defense, finding that "requiring payments pursuant to the purchase-of-coal clause cannot be said to be enforcing a restraint of trade within the meaning of *Kelly*" because the 1974 agreement had expired, and that "decisions to purchase or not to purchase have been made and acted upon."[15] The court held that the section 8(e) challenge to the clause was not a valid defense because that claim had not been raised before the NLRB in a timely fashion.[16] Finally, the court ordered Kaiser Steel to pay plaintiffs' attorney's fees.[17]

---

[10] Brief for Appellant at 7-8.

[11] Brief for Appellees at 6.

[12] 15 U.S.C. §§ 1, 2 (1976).

[13] 29 U.S.C. § 158 (1976).

[14] 358 U.S. 516 (1959).

[15] 466 F. Supp. 911, 915 (D.D.C. 1979).

[16] *Id.* at 916-17.

[17] *Id.* at 917.

II. Enforcement of an Illegal Clause

On the question of illegality, my colleagues do *not* purport to hold that the clause is *legal*; rather, they believe that the alleged illegality of the clause under labor and antitrust law is *irrelevant*. They say:

> The narrow issue on appeal, therefore, is not whether an illegal contract clause should be enforced but rather whether Kaiser's proffered defense of illegality should be entertained. . . . [T]he district court decided that Kaiser was not entitled to interpose the illegality defense. This, we now hold, is correct.[18]

This is a fair statement of the trial court's ground of decision, and of the position in which the issue comes to us, but the answer given is wrong on at least two counts.

In the first place, if Kaiser is not entitled to judicial consideration of the clause's illegality as an affirmative defense, it may very well be held to have waived any challenge to it anywhere, anytime. Federal Rule of Civil Procedure 8(c) states that "a party shall set forth affirmatively . . . illegality" as an affirmative defense. A defendant's failure to raise the issue of illegality under the applicable substantive law may result in a waiver of that claim.[19] If an affirmative defense is not treated as the equivalent of an action for enforcement to test the substantive law, then the lawful character *vel non* of a contract clause is left behind in a handicapped "race to the courthouse."

In the second place, there are only two logical grounds on which a court can order enforcement of a contract

---

[18] Majority Opinion at 8-9.

[19] *See Stanish* v. *Polish Roman Catholic Union of America*, 484 F.2d 713 (7th Cir. 1973); 2A Moore's Federal Practice ¶ 8.27[3] (1979).

clause whose legality has been challenged: (1) The court can find that the clause is legal, or (2) the court can assume (or find) the clause to be illegal and enforce it for other reasons. In my view, neither option is tenable in this case. The first is foreclosed because no finding has been made that the clause is legal. With respect to the second, I believe that if the clause is illegal, it is unenforceable, as I shall proceed to show.

A. *The Principles of* Kelly *v.* Kosuga *Prohibit Enforcement of an Illegal Clause*

In *Kelly* v. *Kosuga*[20] plaintiffs sold onions to defendant at an agreed-upon price. The parties made an *additional* agreement not to deliver onions to the futures market in order to keep the price of onions high. The defendant-purchaser took delivery of some of the onions and refused to pay the agreed-upon purchase price. When the plaintiff-seller sued for the purchase price, the purchaser defended on the basis that the agreement to withhold the onions from the futures market violated the antitrust laws and precluded enforcement of his contractual obligation to pay for the onions. In rejecting the defense, the Supreme Court noted that antitrust defenses to contract actions have "not met with much favor," particularly when a vendor seeks to recover an agreed-upon price for goods sold.[21] It reasoned that "[*p*]*ast the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act*, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.' "[22]

---

[20] 358 U.S. 516 (1959).

[21] *Id.* at 518.

[22] *Id.* at 520-21 (quoting *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U.S. 227, 271 (1909) (Holmes, J., dissenting) (emphasis added).

With these principles in mind, the Court found that *although "the nondelivery agreement between the parties could not be enforced by a court, if its unlawful character under the Sherman Act be assumed,"* giving "legal effect to a completed sale of onions at a fair price" would not "enforce a violation of the Act."[23] Thus, reasoned the Court, "while analysis in terms of 'divisibility' or some other verbal formula may well be circular, . . . in any event, where, as here, a lawful sale for a fair consideration constitutes an *intelligible economic transaction in itself*, we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question."[24] On that basis the Court reaffirmed the common-law rule that the illegality of a portion of a contract does not prevent a court from enforcing a severable legal portion of that contract.[25]

1. *Enforcing The Purchase-Of-Coal Clause Implements Conduct Proscribed By Law*

Because the purchase-of-coal clause in itself is violative of antitrust and labor law (as we must assume on this summary judgment[26]) *Kelly* forbids its en-

---

[23] *Id.* at 521 (emphasis added).

[24] *Id.* (emphasis added) (citation omitted).

[25] *See* 6A Corbin §§ 1518-1531 (1962).

[26] The court questions in footnote 6 of the majority opinion whether "the illegality of the disputed clause must be assumed because this is an appeal from a summary judgment," citing 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1368, at 692-93 (1969). That authority, *id.* at 693, states, however, that:

> In addition to assuming the truthfulness of the actual allegations for purposes of the motion, *all reasonable inferences and intendments from these facts are drawn in favor of the nonmoving party.* [citations omitted] In

forcement.[27]

Kaiser contends that the purchase-of-coal clause violates the antitrust laws because it is a group boycott against nonsignatory coal companies. Nonsignatories are injured by the clause because UMWA operators are deterred economically from making purchases from them.[28]

National Labor Board v. *Weirton Steel Company*, [146 F.2d 144 (3d Cir. 1944)], for example, the NLRB brought a contempt proceeding for violation of a decree involving certain unfair labor practices and moved for a partial summary judgment on the pleadings. The Third Circuit refused to grant the motion, although it recognized that by drawing certain inferences from the facts, the conclusion sought by the Board might be supported. The court stated;

> but, a court is without right to draw inferences favorable to a movement for summary judgment on [the] pleadings. In that situation, all reasonable intendments and inferences from the pleadings are, as a matter of law, to be taken against the movement and in favor of the opponent. [*Id.* at 145]

Surely, the manifest implications in Kaiser's pleadings would support judicial inference regarding the antitrust defense. These inferences are sufficient to vitiate the propriety of the district judge's refusal to entertain the antitrust defense without receiving any proof at all of the subject.

[27] The majority's discussion of *Kelly* is simply conclusory. Though the majority purports not to be examining the application of the Sherman Act to the contract clause at issue in this litigation, footnotes 5-7 to the court's opinion appear to assume *sub rosa* an antitrust holding favoring appellees. This is inappropriate in an appeal taken from a summary judgment granted below, when the trial court never reached the question of illegality. Nevertheless, their reliance on *Kelly* in this case, where enforcement of the clause in question has the necessary effect of restraining trade with nonunion coal producers, is totally indefensible, whatever the ultimate decision on the merits on other grounds.

[28] In order to compete for business from designatories, nonsignatories must lower their prices to make it economically

Signatories are injured because they must choose between restricting their purchases to other signatories or paying a "penalty" when purchasing from nonsignatories.

The district court held that enforcing the clause would not make the court a "party to the carrying out one of the very restraints forbidden by the Sherman Act." It reasoned that because the 1974 agreement had expired and decisions to purchase or not to purchase had already been implemented, enforcement would not cause Kaiser to refrain from purchasing non-UMWA coal.[29] Observe that the district court did *not* hold that if the contract were current, enforcement of the illegal clause would be authorized.

But my colleagues go further. They ask: "how can the court be a party to an anti-competitive scheme simply by enforcing a contract which requires employers to

---

feasible for UMWA operators to pay the purchase price and make a contribution to the health and pension funds as well.

[29] The trustees argue that because Kaiser continued to make purchases from nonsignatories, "there was no boycott of nonunion coal producers." Therefore, they submit the clause does not lead to conduct proscribed by the Sherman Act, and the exception to *Kelly* is inapplicable. Brief for Appellees at 27. In other words, the trustees argue that the antitrust defense may not be raised because there was no antitrust violation. And Kaiser may not prove the antitrust violation because the antitrust defense may not be raised. This is blatant circular reasoning and is unacceptable.

That Kaiser continued to make purchases from nonunion coal companies does not prove that the purchase-of-coal clause had no deterrent effects. It may well be that the only reason Kaiser did so was that it believed it would not have to pay the purchase-of-coal "penalty," and therefore did not take that into consideration in its purchasing decisions. In any event, Kaiser should first be allowed to make its case that the clause had anticompetitive effects before a court concludes on summary judgment that the defense must be disallowed because no violation occurred.

make payments into a union's health and retirement funds?" "Elementary, my dear Watson": simply because the payments compelled by the court are payments under the illegal contract, an effort to enforce an illegal secondary boycott.[30] Furthermore, there is the impingement on

---

[30] Are natural consequences of intended acts irrelevant? More sophisticated scrutiny would not so blithely overlook the necessary effects of the clause cooked up by the union. The effects of that clause are clearly injurious to nonunion producers *and* their employees. The majority opinion, reluctant to draw inferences about the anticompetitive character of the clause, is much quicker to draw the inference that the purchase-of-coal clause was intended to counteract wage competition among coal producers, *see* footnote 5 of the majority opinion.

The "wage competition" issue diverts attention away from the proper focus for attention on this appeal. There has been no finding whatsoever that the employees of nonunion producers received less advantageous wages than unionized employees. Moreover, courts have traditionally looked beyond the facial appearance of challenged activities. In *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), the Supreme Court labeled as price fixing a concerted program whereby oil companies entered the oil market as buyers. The Court held that this buying program represented price fixing, a *per se* violation of the Sherman Act. The violation resulted from the *necessary effect* that the program would have on prices. It is important to note that the necessary effect was proscribed regardless of whether "the conspirators had the means available for accomplishment of their objective." *Id.* at 225 n.59. Here, just as in *Socony-Vacuum*, the anticompetitive effect can be inferred from the consequences logically entailed by the operation of the purchase-of-coal clause. The following quote from SULLIVAN, ANTITRUST 313 (1977) is informative:

> [W]here the course agreed upon is not explicitly to fix prices or divide territories, there may also be, as there was in *Socony-Vacuum*, inference involved in the conclusion that the purpose and effect of what was expressly agreed upon is tantamount to price fixing or market division or that the purpose and effect (though not

Kaiser's purchasing discretion, an interest the antitrust laws were meant to protect. Kaiser has an interest in being able to make purchases from "boycotted" companies without being required to pay penalties for so doing.

Requiring Kaiser to make these penalty payments is enforcement of the precise conduct made unlawful by the antitrust laws. Just as the Supreme Court observed that the nondelivery agreement in *Kelly* "could not be 'enforced by a court, if its unlawful character under the Sherman Act be assumed,"[31] so also I conclude that the purchase-of-coal clause is unenforceable if it is assumed to violate the antitrust laws. The *legal* part of the contract in *Kelly* was the sale and delivery of the particular load of onions, payment for which the Supreme Court

---

capable of being assimiliated under one of the *per se* violations) is nevertheless unreasonable. [footnote omitted] Inference, be it understood, may be involved in one or more of several steps in the analysis, in deciding that an agreement took place, in concluding that the agreement which did take place should be characterized in a way which offends a *per se* rule, or in concluding that the agreement is, on balance, unreasonable.

[31] 358 U.S. at 521.

The majority opinion confounds the ostensible purpose of the purchase-of-coal clause and its necessary effects. The majority writes in footnote 9: "On its face, and apart from any consideration of its purpose and effect in a particular context, the purchase-of-coal clause 'constitutes an intelligible economic transaction in itself.' *Kelly*, 358 U.S. at 521. Accordingly, *Kelly* requires that the illegality defense must be disallowed." This is another instance of the majority's failing to recognize that however "intelligible" the purchase-of-coal clause is, it is *itself* the offensive clause under the antitrust laws. When the court enforces this clause it promotes the necessary effects of the clause and harms the economic interests of both sellers and buyers of nonunion coal. The antitrust violation is implicit in the purchase-of-coal clause itself; there is no allegation that any other part of the collective bargaining agreement between the union and Kaiser is violative of the antitrust laws.

enforced; the *legal* part of the contract here is the payment into the fund of a royalty on every ton of coal mined by Kaiser itself, payment of which has been made 100% by Kaiser. The *illegal* part of the contract in *Kelly* was the agreement not to deliver onions to the futures market, which the Supreme Court held could not be enforced, but since this illegal part was *not* the part sought to be enforced, its illegality was irrelevant to the enforceability of the legal, already-executed portion on which the suit was brought; the *illegal* part of the contract in the case at bar is the agreement for Kaiser to pay a royalty on coal which it has not mined, *and since this is the very part of the contract sought to be enforced, its illegality cannot be irrelevant. Its illegality makes it unenforceable, just as was the nondelivery agreement in Kelly.*

As Kaiser points out in its brief, if it were to sue the UMWA for damages under the antitrust laws, it would arguably be able to recover any purchase-of-coal penalty payments it made pursuant to the unlawful clause.[32] It would be unseemly for this court to compel Kaiser to make the very payments giving rise to pecuniary injury redressable under the antitrust laws.

Likewise, enforcing the clause would result in the precise conduct section 8(e) is meant to proscribe. The section's prohibition of hot cargo agreements was intended to protect neutral employers like Kaiser from harm caused by being caught in the middle of a dispute between other parties.[33] It is argued that the purpose of the purchase-of-coal clause is to pressure UMWA signatories to boycott non-UMWA producers, thereby giving the union a lever in its attempt to organize the nonsig-

---

[32] Brief for Appellant at 26-27.

[33] *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 624-25, 635 (1967).

natories.[34] Assuming this is the case, compelling Kaiser to make the penalty payment results in the principal injury section 8(e) is intended to prevent: harm to neutral parties.[35]

The majority recognizes, without so saying, that the effect of the purchase of coal clause is to penalize (either by eliminating sales or forcing sales at lower prices) the purchase of nonunion coal: "If Kaiser had raised a timely challenge to the purchase-of-coal-clause and won, the union (as guaranteed in the contract) would have had a chance to bargain for a lawful substitute. It might have succeeded in obtaining an increased rate of contribution for coal mined by an employer's own workers to offset what was lost by the invalidation (*ex hypothesis*) of the disputed clause." Majority opinion at 19. This insight comprehends indubitably the clause's effect, which is to allocate the cost of the benefits received by union employees to nonunion employees and producers. The nonunion parties receive no benefits from this additional cost transferred to them by the operation of the purchase-of coal provision. It is plain that a penalty is involved where nonunion producers and employees pay a price without

---

[34] Brief for Appellant at 4.

[35] The court states (at footnote 5): "It may well be that the provision Kaiser challenges here is a kind of 'union standards' clause and, hence, lawful under section 8(e)." *But there is no issue in this case of pension benefits "below union standards."* It must be assumed that the price Kaiser pays for coal it buys from nonunion producers includes a component attributable to the pension benefits the nonunion producers pay their employees. The clause at issue only prejudices the nonunion producers by making their coal less attractive to Kaiser; and prejudices Kaiser by constraining its opportunity to choose coal suppliers for itself. Though the majority writes "[i]t may well be . . .", there is no evidence that this clause was a "union standards" clause, and such an assumption is unwarranted on this appeal from summary judgment granted below. *See* note 30 *supra*.

realizing any benefits. The nominal assignment to Kaiser of the costs associated with the purchase-of-coal clause does not mitigate the damage to the nonunion parties. The damage, or penalty effect, results when Kaiser would naturally shift part of the cost to the nonunion parties by decreasing coal purchases from them and increasing purchases from union producers, *i.e.*, even paying somewhat higher prices or purchasing from nonunion producers at sufficiently lower prices.

Enforcement of this illegal claim in the now expired contract will, of course, have future effects. The same clause is present in the current contract.[36] On the basis of this precedent, all the trustees have to do respecting the present contract is wait until it expires and automatically collect on it, too. By enforcing an illegal contract in this suit the court provides a precedent for enforcement in the future of a contract which Congress has outlawed. It is true that Kaiser still has the option of seeking a declaratory judgment as to the 1978 contract or suing the union for treble the amount it is ordered to pay here. But for reasons expressed elsewhere in this opinion,[37] I believe it is unfair to require a party wronged by an illegal clause to sue at a time and place satisfactory to the offending party. And the logical time —perhaps the only time—[38] to determine whether the clause is illegal is when enforcement is sought.

2. *Nonenforcement Of The Clause Does Not Result In A Windfall For Kaiser*

The trustees argue that the purchase-of-coal payments are a form of compensation and, relying on *Kelly*, submit

---

[36] National Bituminous Coal Wage Agreement of 1978, Effective 27 March 1978, *reprinted in* J.A. at 487-89.

[37] *See* text & accompanying notes 42-51 *infra*.

[38] *See* note 19 *supra*.

that the clause should be enforced to avoid giving Kaiser something "for nothing."[39] On simple basic economic analysis, withholding enforcement could *not* result in a "windfall" for Kaiser. There is evidence in the record indicating that Mid-Continent, from whom Kaiser purchased virtually all of its requirements for mid-volatile coal, provides wages and benefits equal to or better than those provided by UMWA operators.[40] Mid-Continent makes contributions to a pension plan for its own employees,[41] and presumably *these costs are included in the price at which the coal is offered Kaiser.* Thus, every time Kaiser buys a ton of coal from Mid-Continent, part of the price goes into the pension fund for the Mid-Continent miners. It is no windfall for Kaiser if this court declines to enforce a contract requirement that the steel company *also* contribute to a pension fund for miners who did *not* extract the coal; paying fully once for the miners who did the work should be sufficient. If anything, compelling payment of such an unearned royalty to the fund could be viewed as a windfall for the UMWA fund.

3. *Availability Of Other Remedies And Kaiser's "Delay" Do Not Vitiate Defense*

The trustees argue that Kaiser should be precluded from raising the antitrust defense because other remedies were available to the company.[42] Kaiser questions whether it previously could have brought an antitrust action, since

---

[39] Brief for Appellees at 22-23.

[40] Affidavit of Robert Delaney at 3-7 (9 Oct. 1978), *reprinted in* J.A. at 329-33; Affidavit of S. W. Zanolli at 7-8 (18 Oct. 1978), *reprinted in* J.A. at 480-81.

[41] Affidavit of Robert Delaney at 406 (9 Oct. 1978), *reprinted in* J.A. at 331-32.

[42] Brief for Appellees at 23.

absent enforcement of the claim it arguably suffered no antitrust injury.[43] The trustees suggest that even so, Kaiser could have brought an action for declaratory judgment as did United States Steel.[44] They argue that "[h]aving determined not to challenge the purchase-of-coal clause at the proper time and in the proper fashion, [Kaiser] cannot be heard now to complain that the Agreement should not be enforced."[45]

The Court in *Kelly* referred to a judicial reluctance to add nonenforcement of contracts to the arsenal of remedies expressly made available by the Sherman Act.[46] Nevertheless, it recognized an interest in avoiding judicial sanction of restraints of trade, and concluded that nonenforcement of contracts would not be precluded "where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act."[47] Since compelling purchase-of-coal payments by Kaiser would result in such conduct, *i.e.*, punishment of Kaiser for not complying with a group boycott, on *Kelly* principles this is a situation where enforcement should be denied.

The trustees further intimate that Kaiser's refraining from challenging the clause until the contract had expired and the miners had completed their portion of the agreement was unfair.[48] The trustees claim that they did not know of Kaiser's refusal to make the payments until

---

[43] Brief for Appellant at 28.

[44] *United States Steel Corp.* v. *UMWA et al.*, No. 75-1966 (D.D.C. 1977).

[45] Brief for Appellees at 23.

[46] 358 U.S. at 518-19.

[47] *Id.* at 520.

[48] Brief for Appellees at 20.

near the end of the contract period.[49] They point out that had the clause been struck down during the time the contract was in force, a substitute clause could have been negotiated.[50]

To a large degree, the trustees' "unfairness" argument depends on their alleged ignorance of Kaiser's decision not to make purchase-of-coal payments—a claim which is *not* available to the trustees in this summary judgment proceeding. If the trustees *did* have knowledge of the breach—and this we must now assume—Kaiser's election not to challenge the clause in court would not be unfair, because the trustees could have moved in the district court or the NLRB to compel the company to make the payments. Kaiser asserts that the trustees were aware of the nonpayment from 1971 on. If so, and we so assume on summary judgment, it was the *trustees* who had the obligation to take earlier legal action, not Kaiser. The district court *did not make a finding that the trustees lacked knowledge of the breach* during the contract period, *nor, significantly, did the trustees even make such a claim* in their Statement of Material Facts as to Which There is no Genuine Dispute accompanying their motion for summary judgment. If such a claim had been made, no doubt Kaiser would have vigorously disputed it, as Kaiser has in its appellate brief, and thus summary judgment by the district court would have been impossible. It is now therefore outside an appellate court's function to find that Kaiser acted unfairly based on the trustees' possible ignorance of the refusal to pay.

The failure of the union or of the trustees to object to or comment upon Kaiser's noncompliance with the

---

[49] *Id.* at 6.

[50] *Id.* at 7.

purchase-of-coal clause may indicate their suspicion that the illegality projected for the clause in Article XX(d)(1) would in fact materialize if challenged. By waiting until after the expiration of the 1974 Agreement, the union and trustees may have sought to accomplish an end-around the renegotiation provision and its implied recognition that the purchase-of-coal arrangement would not withstand legal inquiry. In any event, Article XX(d)(1) suggests that the parties to the Agreement all had doubts regarding the clause and were aware that its lawfulness was likely to be reviewed.[51] The Court's decision today unfortunately leaves these understandable doubts unresolved.

Furthermore, it was perfectly permissible in this case for Kaiser to wait until the trustees sued before raising the antitrust defense. Arguably wronged by the union's insistence on inclusion of an illegal clause in the labor contract, Kaiser should be under no obligation to accommodate the labor union and trustees by testing the validity of the clause at a time and in a manner satisfactory to the trustees and the UMWA. Kaiser has pursued its remedy (at the time) which became appropriate, given

---

[51] "Equitable considerations," *see* maj. op. at 15-19 would not free the trustees to circumvent the unlawfulness of a provision intended to benefit the trusts which they administer. Kaiser's challenge of the purchase-of-coal clause, which takes the form of an affirmative defense, is a matter to be decided at law, not equity.

A curious point, however, is that the trustee's legal position has been that they had no notice that Kaiser made no reports or payments in accordance with the terms of the purchase-of-coal clause. Surely this failure to be currently informed of matters pertaining to the employee pension fund manifests a problem for the trustees or this court when they rely upon "equitable considerations."

the appellees' instigation of this lawsuit in the forum and moment of their choice.[52]

Requiring parties subject to onerous, illegal clauses to sue immediately in order to retain the illegality defense is not only unfair, but it increases unnecessary litigation. Ofttimes offending parties recognize that certain clauses are illegal and never seek judicial enforcement. Allowing wronged parties to wait and see if enforcement is sought before raising the illegality defense results in better use of judicial resources and relieves the parties of unnecessary expense.

4. *Other Case Law Does Not Support Enforcement of the Illegal Contract Clause Here*

In arguing that illegality is irrelevant here, the trustees place a great deal of reliance on the Third Circuit's decision in *Huge* v. *Long's Hauling Co.*,[53] particularly Judge Adams' concurring opinion. In that case, in contrast to Kaiser's regular payment on all coal *it* mined, the employer sought to avoid making *any* payment into the UMWA's health and retirement funds, based on the alleged illegality of a clause prohibiting subcontracting of coal transportation to nonsignatories. Noting that pension fund contributions "*payable for coal already mined*"[54] are a form of compensation for services performed, that courts are reluctant to recognize defenses against employer promises to make such payments, and that other

---

[52] That Kaiser may have drawn upon other inchoate remedies suggests, perhaps, that some nature of relief should be availing. There is no justified fear, of course, that Kaiser's alleged surfeit of "other" remedies would entail excessive relief from the burden of a contract clause which is maintained to be unlawful.

[53] 590 F.2d 457 (3d Cir. 1978).

[54] *Id.* at 459 (emphasis added).

antitrust remedies were available to the company, the court disallowed the antitrust defense.[55] In so holding, the court followed the *Kelly* rule that the possible illegality of one clause in a contract does not prevent enforcement of a *separable, legal* portion of the agreement. Most significantly, *Long's Hauling* did not hold that a court should enforce a clause that *in itself* violates the antitrust laws.

Concurring in *Long's Hauling*, Judge Adams advocated a special rule with respect to union trust funds. He urged that "where the trustees of a union welfare or pension fund sue to compel an employer to make contributions as stipulated in the labor contract between the employer and the union, the employer may not assert *any* defenses that he may arguably have to that contract."[56] In support of this argument, Judge Adams relied on the Supreme Court's decision in *Lewis* v. *Benedict Coal*[57] and the importance of pension funds. However, neither *Benedict Coal* nor the utility of trust funds warrants adoption of his special, proposed rule.

Benedict Coal is not inconsistent with Judge Adams' proposal, but it is inapplicable to the instant appeal. In *Benedict Coal* the Court was faced with an employer's attempt to set off against amounts due the union pension fund damages suffered by the employer from illegal work stoppages and strikes. The Court determined that this depended on whether the collective bargaining agreement could be construed to make (1) the union's performance of its promises a condition precedent to payment of royalties to the trustee, or (2) the trustee's right to the royalties subject to counterclaims the employer has

---

[55] *Id.* at 459-60.

[56] *Id.* at 463 (Adams, J., concurring) (original emphasis).

[57] 361 U.S. 459 (1960).

against the union. The court found that performance of union promises was not a condition precedent to royalty payment.[58] It also held that a collective bargaining agreement would not be construed to subject the trustee's right to the royalties to offset by employer claims against the union, unless such an intent were expressed in "unequivocal words." Such words were not present in the agreement, and no set off was allowed.[59] Thus *Benedict Coal* presented primarily a question of contract construction; nowhere did the Court suggest that fund trustees may enforce illegal contracts.

I believe that union trust funds serve vital public interests. But I do not think that their importance warrants a wholesale exemption from the rule that courts should not enforce illegal contract clauses. Society has an interest in discouraging unlawful conduct, including that of labor unions as well as business. The *Kelly* standard strikes the best balance between society's interest in sound trust funds and in deterring unlawfulness; and besides, it is the Supreme Court which has struck that balance. Thus if payment into union funds of "penalty" or other contributions itself would violate the law, any law-abiding court must deny such a remedy. Since compelling payment here would violate the law, enforcement cannot be granted.

In addition to *Long's Hauling*, the majority opinion relies heavily on *Waggoner* v. *R. McGray, Inc.*,[60] wherein a panel of the Ninth Circuit held, over a dissent, that the primary jurisdiction doctrine precludes a federal court from entertaining an unfair labor practice defense. In *Waggoner* trustees of a number of employee benefit

---

[58] *Id.* at 465-66.

[59] *Id.* at 466, 470-71.

[60] 607 F.2d 1229 (9th Cir. 1979).

funds sued various building contractors and subcontractors for payments due under the terms of a "Master Labor Agreement." This Agreement required signatory employers to make fringe benefit contributions on an hours-worked basis to the trusts established for their employees. Furthermore, contractors were by the terms of the Agreement prohibited from granting contracts to subcontractors who were "delinquent." The contractors were also to become liable for the delinquencies of those subcontractors who had been granted contracts after having been posted on a "delinquency list" prepared and furnished to the contractors by the union. The defendant employers, contractors and subcontractors, were all signatories to the Agreement.

The decision in *Waggoner* rests on outstanding differences in the facts, which distinguish the situation in that case from the case before this court. In *Waggoner* the alleged right to employee benefit contributions operated to benefit union members *who had in fact worked the hours to accrue the benefits.* All of the employees, unions, and employers *who were affected* by this provision of the Agreement *were also parties to the Agreement.* In the case before this court, on the other hand, the union trustees demand that Kaiser be compelled to make contributions in accordance with the hours worked by nonunion employees who were never party to the applicable Agreement and do not benefit from it. *This distinction, of course, explains the antitrust defense raised here by Kaiser whereas no such defense was interposed in* Waggoner. The restraint of trade effect, which for summary judgment purposes we must assume to be present in the case before us today, casts the instant facts and defenses in a substantially different light. This distinction removes our case from the more limited arena of employers and employees bargaining together to reach a collective agreement to govern their own limited relations. Consequently, judicial interference becomes more appropriate.

The *Waggoner* court also fails to consider fully the impact of recent Supreme Court cases which limit the primary jurisdiction doctrine. The Ninth Circuit, full of enthusiasm to enforce a stiff primary jurisdiction rule, repeatedly cited *Sears, Roebuck & Co.* v. *Carpenters*,[61] as authority for its outcome, even though the *Carpenters* decision expands quite considerably the jurisdiction of courts to consider questions which occur in the context of labor disputes. To be sure, *Waggoner* recognized that "later cases have *refined* the *Garmon* [primary jurisdiction] standard." [62]

This "refinement" of the primary jurisdiction doctrine is evinced as well in *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*,[63] but is not relied upon in *Waggoner*. In *Connell* the Supreme Court held "that the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws." [64] The majority in *Connell* were persuaded that "[t]here is no legislative history in the 1959 Congress suggesting that labor-law remedies for § 8(e) violations were intended to be exclusive, or that Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRA." [65]

It is odd that *Waggoner* reflects only part way the statutory and precedential authorities which permit district courts to adjudicate suits over collective bargaining

---

[61] 436 U.S. 180 (1978).

[62] 607 F.2d at 1233 (citing *Carpenters*) (emphasis added).

[63] 421 U.S. 616 (1975).

[64] *Id.* at 626 (footnote omitted).

[65] *Id.* at 634 (footnote discussing Justice Stewart's dissent *id.* at 638, 650 omitted).

agreements which arise under section 301 of the Labor Management Relations Act.[66] Thus, *Waggoner* would require employers to face union claims in district courts[67] without allowing the same forum and opportunity to hear the correlative defenses.[68] This bifurcation seems hardly equitable in view of the Supreme Court's restrictions upon the primary jurisdiction doctrine, as well as usual concern for judicial consolidation in the interest of coherence and efficiency.

The trustees cite several other cases that rely on *Kelly* in arguing that illegality of the clause is irrelevant in this action.[69] With one exception, all of the cases involved

---

[66] 29 U.S.C. § 185 (1976).

[67] *See* 607 F.2d at 1234-35.

[68] *See id.* at 1236.

[69] *See* Reply Brief for Appellant at 11, 12 n.14 (citing following cases): *e.g.*, *Pennington* v. *United Mine Workers*, 325 F.2d 804 (6th Cir. 1963) (rejecting employer's attempt to avoid welfare fund contribution because union security clause was illegal and the contract was entered under duress), *cert. denied*, 381 U.S. 949 (1965); *Universal Towing Co.* v. *United Barge Co.*, 579 F.2d 1098, 1103 (8th Cir. 1978) (party to contract tried to avoid obligation to pay rent on ground that contract contained a separate price fixing agreement); *Arkla Air Conditioning Co.* v. *Famous Supply Co.*, 551 F.2d 125, 127 (6th Cir. 1977) (manufacturer tried to avoid paying commissions owed to distributor under agreement that included exclusive territorial arrangement, arguing that the exclusive was illegal; the court (i) held that the unlawful provision was collateral to that sought to be enforced and that enforcing the payment obligation would not bring about antitrust injury and (ii) noted that, since the manufacturer was the source of the restrictions, the defense "lies ill in the mouth of the defendant"); *Levin* v. *IBM*, 319 F. Supp. 51 (S.D.N.Y. 1970) (plaintiff sought to prevent foreclosure by lessor for nonpayment of rent on ground that lease agreement also included alleged tie-in provision); *Viacom Int'l Inc.* v. *Tandem Prod., Inc.*, 526 F.2d at 598 (whether contract clause could be enforced would "depend on the court's percep-

attempts to avoid enforcement of legal clauses on the ground that a collateral, separable portion of the agreement was illegal. The sole exception is *Mullins* v. *Reitz Coal Co.*,[70] decided by a district court in our circuit after the instant district court decision was issued.

The fact situation in *Reitz* was almost identical to that of this appeal. In rejecting the antitrust defense, the court purported to follow *Long's Hauling* and *Kelly*. It asserted that "enforcement of the defendants' obligations to make contributions can hardly be viewed as" enforcing an antitrust violation.[71] The district court's analysis does not face up to the real issue here. If we assume, as we must, that the purchase-of-coal clause violates the antitrust laws, then enforcement of the clause also violates the law.

On the basis of the above analysis, it is clear that the Supreme Court's rationale in *Kelly* (and progeny) support, rather than negate, the applicability of Kaiser's illegality defense.

B. *The District Court Had Jurisdiction to Determine Whether the Clause Violated Section 8(e)*

The district court rejected Kaiser's proffered defense that the purchase-of-coal clause violated section 8(e),

---

tion of the contract [provision sought to be enforced] as a separate or 'collateral' entity or as an integral part of [the illegal provision], enforcement of which would effectuate 'the precise conduct made unlawful' "); *Thomas* v. *Reading Anthracite Co.*, 264 F. Supp. 339, 344-48 (M.D. Pa. 1966) (coal operator defended suit by UMW fund trustees for contributions on ground that funds' management was illegal since "neutral" trustee was union official; the court rejected the defense, not because it was insufficient as a matter of law, but because the defendant operator had ratified the trustee's appointment).

[70] No. 78-715 (D.D.C. 23 Mar. 1979).

[71] *Id.*, slip op. at 6.

holding that the NLRB had exclusive jurisdiction to make such unfair labor determinations. While I agree that the NLRB generally has exclusive jurisdiction to determine unfair labor practice claims when a plaintiff brings suit for relief, its jurisdiction cannot be exclusive when a plaintiff seeks to have a federal court enforce an unlawful contract provision and the labor law issue is raised by way of defense. *The employer cannot be deprived of his legitimate defense of illegality under the labor laws simply by the PLAINTIFF'S choice of forum; the federal court, in order to do justice, must be authorized to adjudicate the legal issues raised by such defense.*

1. *Courts Have Power to Decide Whether Contract Clauses Violate Law and Public Policy*

The authority of federal courts to enforce contracts is necessarily subject to legal and public policy constraints. As the Supreme Court pointed out in *Hurd* v. *Hodge*, "[t]he power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in . . . federal statutes . . . . Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." [72] Section 8(e) is one of those constraints on the authority of the district court to enforce contract clauses. Necessarily then, the district court must have authority to determine the applicability of section 8(e) to the clause it was asked to enforce.

This power and obligation of the courts is particularly clear with respect to section 8(e) because of the section's explicit language.[73]

---

[72] 334 U.S. 24, 34-35 (1948) (footnotes omitted).

[73] Footnote 5 of the amjority opinion suggests that a union's anticompetitive acts are broadly protected by labor law exemp-

2. *Clauses Violating Section 8(e) Are "Unenforcible And Void" and Should Not Be Enforced by Federal Courts*

Section 8(e) declares that "hot cargo" clauses are not only unfair labor practices, but also "unenforcible and void."[74] It would be difficult to phrase a more clear

---

tions to the antitrust law. To be sure, there are statutory and implied labor exemptions for some anticompetitive activity, but the exemptions at most only cover lawful labor practices. *See Consolidated Express, Inc.* v. *New York Shipping Ass'n, Inc.* (*Conex*), 602 F.2d 494 (3d Cir. 1979), *vacated and remanded on other grounds*, 100 S.Ct. 3040 (1980) (violation of section 8(e) "hot cargo" prohibition automatically strips unions and employers of any antitrust exemption). "Where an action seeks only declaratory or injunctive relief, a finding that an agreement violates § 8(e) should always remove the antitrust exemption. Once it is clear that a § 8(e) violation has occurred no labor policy is advanced by permitting on-going operation of an illegal contract. . . ." *Id.* at 519. Though the NLRB had made a previous determination that the contract clause in *Conex* violated § 8(e), and the court decided to give collateral estoppel effect to the NLRB's determination, *id.* at 511-12, the implication of that court's collateral estoppel analysis is that it assumed a district court would certainly have jurisdiction to consider the legality of labor practices and whether they violate the antitrust laws.

[74] 29 U.S.C. § 158(e) (1976).

The majority opinion cites at 3 *International Union, United Mine Workers of America and Bituminous Coal Operators Association*, 188 N.L.R.B. 753 (26 Feb. 1971) (Supplemental Decision and Order) for the proposition that "hot cargo" clauses are not plainly violative of section 8(e). There, the Board held lawful a clause within a collective bargaining agreement between coal miners and coal operators which required the signatory operators to make certain payments to the union for coal they obtained by subcontracting work out to nonsignatory mines. The Board affirmed the Trial Examiner's findings that "the intent of the parties in adopting the 80-cent clause was to equalize the differences in the costs

and unmistakable statutory command that federal courts refrain from enforcing such illegal clauses.

The trustees argue that this language is not meant to create a separate enforcement mechanism independent of

---

of wage and fringe benefits generally existing between mines signatory to the National Bituminous Coal Wage Agreement and those which are not in order to protect the work opportunities and standards provided UMW members employed by signatory operators" and "that wage, fringe, and working condition standards of employees in nonsignatory mines are generally lower than those established in the National Bituminous Coal Wage Agreement. . . ." *Id.* at 753. The Board wrote that: "The validity of a union standards clause lies in the fact that it removes the economic incentive to subcontract unit work to employers maintaining substandard conditions of employment which enable such employers to perform the work at cheaper labor costs. *Id.* at 754. Here, the factor of "union standards" and the *intention* to propogate them are completely missing. There have been no findings that the intent of the parties was to protect the wages and working conditions of the union members, or that there was in fact a disparity in the benefits, *etc.*, received by union as compared with nonunion employees. *See* notes 30 and 35 *supra*. Moreover, in the cited NLRB precedent, Chairman Miller and member Brown dissented strongly. They stated:

> The lawfulness of the clause does not depend upon the parties' subjective intent in executing the clause or upon their conduct in enforcing it. . . .
>
> We are persuaded that the 80-cent clause is an implied union signatory clause, and not a union standards clause as found by our colleagues. Clearly, as the Mid-Continent example demonstrates, signatories are required to make the 80-cent payment on coal purchases from nonsignatories even though the wage and fringe benefit standards of the nonsignatory may be comparable to or even better than those established in the UMW contract, while no such payment is imposed on coal purchased from signatories. . . . Accordingly, even though we accept the Trial Examiner's findings that the parties adopted the clause in order to equalize the wage and fringe benefit costs of signatories and nonsignatories, we must find that the

proceedings before the NLRB. Rather, they suggest that it was used to describe the status of agreements after the NLRB makes an unfair labor determination.

In making this argument the trustees refer to statements in the legislative history indicating that section 8(e) was intended to create a new unfair labor practice. They argue that the addition of the "unenforcible and void" language by amendment did not change Congress's initial purpose or understanding. That amendment provided that "any contract or agreement entered into heretofore or hereafter containing such an [illegal hot cargo clause] shall be to such extent unenforcible and void." [78] The entire purpose of this addition, according to the trustees, was to ensure that the hot cargo prohibition would reach all contracts, even those in effect at the time of the legislation.

I agree that certainly that was one of the purposes of the amendment. But I am also convinced that another purpose was to declare that such clauses cannot be enforced by the courts. As Congressman Griffin, the sponsor of the House bill after whom the statute was

---

parties have failed to embody their purpose in language that operates in a lwaful [sic] manner.

Id. at 755 (footnotes omitted).

It is plain, then, that a "hot cargo" clause is lawful only under the most refined of conditions, and then only marginally. As there is no evidence in the instant case that the purchase-of-coal clause was intended by the parties to the Agreement as a means of standardizing wages and working conditions among union and nonunion employees or even that there was in fact a differential in the treatment of those two groups of workers, the clause can only be viewed as imposing a penalty on purchases of coal from nonunion producers. Any other conclusion rests only on speculation which ill becomes this court.

[78] Pub. L. No. 86-257, § 704(b) 73 Stat. 525, 542-45 (1959) (*codified at* 29 U.S.C. § 158(e) (1976)).

named, stated, the provision "*not only* makes it an unfair labor practice to enter into a 'hot cargo' agreement, *but also, makes it clear that such contracts are 'void and unenforceable.'*" [76] I believe that Congress meant what it said, and that these clauses are unenforceable by the federal courts.

This interpretation finds support in judicial decisions interpreting section 8(e). In *National Woodwork Manufacturers Association* v. *NLRB*,[77] the Supreme Court point out that section 8(e) was designed to plug a gap in prior law resulting from an earlier Supreme Court decision in *Local 1976, Brotherhood of Carpenters* v. *NLRB (Sand Door)*.[78] The Court stated that, among others, was the concern that "[t]he *Sand Door* decision was believed . . . *to create the possibility of damage actions against employers for breaches of 'hot cargo' clauses.*" [79] It was precisely Congress's intent to preclude such damage actions by making the clauses "unenforcible and void."

In *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*,[80] Justice Steward in his dissent stated that "the signatory of a purely voluntary agreement that violates § 8(e) is fully protected from any damage that might result from the illegal 'hot cargo' agreement by *his ability simply to ignore the contract provision that violates § 8(e)* . . . . Since § 8(e) provides that any prohibited agreement is 'unenforceable and void,' *any union effort to invoke legal processes to compel the*

---

[76] 2 NLRB, LEGISLATIVE HISTORY OF LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1523 (1959).

[77] 386 U.S. 612 (1967).

[78] 357 U.S. 93 (1958).

[79] 386 U.S. at 634 (emphasis added).

[80] 421 U.S. 616 (1975).

neutral employer to comply with this purely voluntary agreement would obviously be unavailing." [81] In the case at bar, Kaiser Steel has faithfully followed Mr. Justice Stewart's interpretation, with which the Court's majority did not disagree, but my two colleagues will not let Kaiser ignore the illegal contract provision; on the contrary, they insist on compelling Kaiser as a neutral employer to comply with the illegal agreement.

As shown above, the clear statutory language, legislative history, and subsequent judicial interpretation all indicate that a neutral employer is free to ignore an illegal hot cargo clause and raise the clause's illegality as a defense in any subsequent action brought by the union.

3. *Kaiser Should Be Able to Raise the Section 8(e) Defense as a Collateral Matter*

Even if section 8(e) only operated to make hot cargo clauses unfair labor practices within the jurisdiction of the NLRB, it is clear that the district court would still have authority to rule on the section 8(e) defense as a collateral matter. The Supreme Court pointed out that the federal courts have jurisdiction to consider such questions "in suits brought under independent federal remedies, including the antitrust laws." [82] The trustees argue that this plain language in *Connell* does not authorize consideration of the section 8(e) defense in this case. They point out that the only "collateral" labor law issue the Court was asked to determine in *Connell* was whether Congress intended to sanction certain union conduct by enacting a construction industry proviso to section 8(e). Determining that the conduct was not so sanctioned, the Court found that the union's activity was subject to antitrust laws. The trustees point out that the Court was

---

[81] *Id.* at 649, 650 n.9.

[82] *Id.* at 626 (footnote omitted).

not asked to determine if the union's conduct constituted an unfair labor practice. They would limit the court's authority to consider collateral labor law issues to interpretation of provisos similar to that interpreted in section 8(e).

But I see no reason why the court's authority should be construed so narrowly. In interpreting the construction industry proviso in *Connell*, the Supreme Court considered congressional intent and interests served by section 8(e),[83] the same sort of issues that would be involved in deciding if the purchase-of-coal clause violates section 8(e). Surely, in pursuing the same analysis, the court has authority to rule on the section 8(e) issues presented here.

There is a difference between claims for relief that rest on alleged labor law violation—in which case courts generally defer to the exclusive jurisdiction of the NLRB—and claims relating to or based on other legal grounds for which there is an *independent jurisdictional basis.* Because Kaiser raises the section 8(e) issue by way of defense, in an action brought *by the union's choice* in the district court, the defense *must* be allowed. Federal courts generally have a duty to resolve all legal issues before them, and this case should be no exception.

III. Award of Attorney's Fees

The district court awarded attorney's fees to the trustees without explanation, and without the benefit of briefing or oral argument. Federal courts may not award attorneys fees unless authorized to do so by the governing statute.[84] The trustees brought suit under section 301

---

[83] *See id.* at 628-35.

[84] *Alyeska Pipeline Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975).

of the LMRA [85] and section 502 of the ERISA.[86] In my view, neither of these statutes authorizes the award of attorney's fees in this case. On appeal the trustees apparently concede that attorneys fees are not authorized by the LMRA. They therefore contend that the ERISA gave the district court power to award attorneys fees.

Section 502 of the ERISA provides that a civil action may be brought

> by a . . . fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this title or the terms of the plan.

Section 502(g) of the act in turn authorizes the district court to award attorneys fees "[i]n any action under this title by a . . . fiduciary."

This suit was not brought to challenge a violation of the pension plan, but was brought to enforce a collective bargaining agreement. The trustees, however, argue that the plans were "incorporated into the 1974 agreement" and that Article XX of the agreement was incorporated into the plan. Therefore, they argued that violation of one by Kaiser "would automatically violate the other as well" and that Kaiser's failure to make penalty payments under the purchase-of-coal clause accordingly violated the plans.[87] However, the co-called "incorporation" of Article XX into the plans consists of a description

---

[85] 20 U.S.C. § 185 (1976).

[86] 29 U.S.C. § 1132 (1976).

[87] The 1950 and 1974 pension plans provided: "Contributions to the [pension trusts] to fund the benefits under this Plan shall be paid solely by the Employers in accordance with Article XX of the Wage Agreement." Art. V, ¶ 8, *quoted in* Brief for Appellees at 62. The 1950 and 1974 Benefit Plan stated merely that they were established "[p]ursuant to Article XX of the Wage Agreement." *Id.* Art. I.

of the sources of funding and imposes no independent obligation on Kaiser. I agree with Kaiser that "[t]he plans . . . no more incorporate Article XX than the 1974 Agreement incorporates the Consumer Price Index to which it refers." [88]

The trustees also argue that they filed suit to "enforce express provisions of" ERISA. They theorize that because *they were required* by ERISA to bring the action that it was brought to enforce ERISA. This argument is absurd. The trustees have confused an effort to *comply* with ERISA with an action to *enforce* it. It may be that had trustees foregone suit against Kaiser they would have been suable under ERISA. But since it has not been shown that Kaiser violated the terms of ERISA or of the plans, I do not see how this suit can be said to enforce ERISA.

Because this action was not brought to enforce a plan or ERISA, I conclude that the district court erred in awarding the trustees' attorney's fees.

IV. Conclusion

This court does not sit to enforce illegal contract clauses. Since the district court held that illegality was irrelevant, it made no determination whether the clause violated antitrust and labor laws. The judgment of the district court should be reversed and the case remanded for a determination whether the purchase-of-coal clause in fact violates antitrust and labor laws. I therefore dissent from the affirmance of the judgment in favor of the trustees.

Furthermore, even if the judgment in favor of the trustees is to be affirmed, I would reverse the award of attorney's fees because such is unauthorized by applicable statutes.

For these reasons I respectfully dissent.

---

[88] Reply Brief for Appellant at 24-25.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-650

JULIUS MULLINS, *et al.*,
Plaintiffs

v.

KAISER STEEL CORPORATION,
Defendant

ORDER

Upon consideration of plaintiffs' and defendant's motions for summary judgment, memoranda in support thereof and in opposition thereto, and the entire record, it is by the Court, this 28th day of February 1979,

ORDERED that the motion of plaintiff Trustees for summary judgment is hereby granted; it is further

ORDERED that the motion of defendant Kaiser Steel Corporation for summary judgment is hereby denied; it is further

ORDERED that defendant file remittance advice reports covering coal procured or acquired for each month covered by the National Bituminous Coal Wage Agreement of 1974 (hereinafter the "1974 Agreement"); it is further

ORDERED that defendant pay to the United Mine Workers of America Health and Retirement Funds (hereinafter the "Funds") the full amounts due under the "purchase-of-coal" clause of Article XX(d) of the 1974 Agreement, including interest on the amounts from the date they became due and owing; it is further

ORDERED that in compliance with Article XX of the 1974 Agreement, defendant shall present for inspection or copying, or both, all records pertaining to coal procurred or acquired which are necessary to verify the amounts due and owing to the Funds pursuant to the 1974 Agreement and to pay the costs of any audits conducted by plaintiff Trustees in connection with the verification of these amounts; and it is further

ORDERED that defendant pay the plaintiff Trustees reasonable attorneys' fees plus the costs of this action.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 78-0650

JULIUS MULLINS, *et al.*,
Plaintiffs,

v.

KAISER STEEL CORPORATION,
Defendant.

March 9, 1979

Stephen J. Pollak, Washington, D.C., for plaintiffs.

A. Douglas Melamed, Washington, D.C., for defendant.

MEMORANDUM OPINION

JUNE L. GREEN, District Judge.

The difficult questions before the Court concern the legality and enforceability of a clause of the National Bituminous Coal Wage Agreement of 1974 (hereinafter the "1974 Agreement")[1] providing for a royalty payment to the United Mine Workers of America Health and Retirement Funds (hereinafter the "Funds") on all bituminous coal procured or acquired by a signatory employer for use or for sale on which contributions to the

---

[1] The National Bituminous Coal Wage Agreement of 1974 is a collective bargaining agreement executed by the United Mine Workers of America International Union, various multi-employer bargaining entities, the largest of which is the Bituminous Coal Operators Association (hereinafter "BCOA"), and certain individual coal operators. The 1974 Agreement was in force and effect between December 6, 1974 and December 6, 1977.

Funds had not been made (hereinafter the "purchase-of-coal clause").[2] The purchase-of-coal clause is only one component of the 1974 Agreement which establishes the terms and conditions of employment for Kaiser Steel Corporation (hereinafter "Kaiser") coal mining employees. The 1974 Agreement also requires Kaiser to make payments to the Funds based on the hours worked and coal produced by its employees.[3] Kaiser, a member of the BCOA and therefore a signatory to the 1974 Agreement, made contributions on the coal produced by its own 400 UMWA employees but failed to make any contributions pursuant to the purchase-of-coal clause. Kaiser never acknowledged any coal purchases voluntarily despite the fact that the terms of the 1974 Agreement were apparently based on the parties' understanding that the Trustees of the Funds would rely upon signatory operators to furnish information concerning the amount of coal produced and purchased (Complaint, Exhibit A, p. 29). The signatories reported under separate entries the tonnage of coal purchased and produced and also calculated the amount of contributions payable to the Funds on "remittance advice forms" supplied by the Trustees.

---

[2] Article XX(d)(1)(v) provides in part:

> . . . during the life of the Agreement, each signatory Employer shall, for the periods of time indicated below, contribute to the Trusts established in this Article in the amounts shown below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal after production by another operator, procured or acquired by such Employer for use or for sale on which contributions to the appropriate Trusts as provided for in this Article have not been made . . .

Complaint, Exhibit A, p. 28.

[3] The plaintiff Trustees have not claimed that Kaiser is delinquent in making contributions to the Funds based on the number of "hours worked" and coal produced by Kaiser employees covered by the 1974 Agreement.

Kaiser also failed to inform the Trustees voluntarily of its decision to withhold Fund contributions required by the purchase-of-coal clause. Had Kaiser elected to test the purchase-of-coal clause during the term of the 1974 Agreement, a contract provision calling for renegotiation in the event of a successful challenge could have been invoked by the Union in order to remedy the resulting deficiency in pension benefit contributions from signatories.[4] The Trustees contend that Kaiser effectively foreclosed the intended application of the renegotiation provision by failing to disclose coal purchases and deprived covered employees of part of their bargained-for wages which the Trustees now seek to recover.

On April 11, 1978, the Trustees of the Funds brought this suit under Section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185 and Section 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132 seeking to recover from Kaiser contributions alleged to be due and owing to the Funds pursuant to the purchase-of-coal clause.[5]

---

[4] Article XX(d)(1)(v)(v) provides in part:

> The parties hereto mutually agree that, if at any time during the term of this Agreement a court or tribunal of competent jurisdiction determines by a final decision that is not appealable that the provision appearing in the paragraph just preceding [purchase-of-coal clause] is invalid or in violation of the National Labor Relations Act, 1947, as amended, or other Federal or state law, the parties shall, at the option and upon demand by the Union without affecting the integrity of any other provision of this Section or any other provision of the National Bituminous Coal Wage Agreement, meet and engage in good faith negotiations to agree upon a clause to be inserted into this Agreement in replacement of the provision found invalid or unlawful.

Complaint, Exhibit A, p. 28.

[5] Memoranda submitted by the parties discuss recovery by the Trustees on a restitution theory but the complaint seeks recovery on the contract only.

Plaintiffs have moved for summary judgment arguing that the principles announced in *Kelly* v. *Kosuga*, 358 U.S. 516, 79 S.Ct. 429, 3 L.Ed.2d 475 (1959) require judicial intervention and enforcement of payments pursuant to the purchase-of-coal provisions regardless of Kaiser's claims of illegality.

In opposition to the Trustees' motion and in support of its own motion for summary judgment, Kaiser contends that its agreement with the United Mine Workers union to contribute to the Funds pursuant to the coal purchase royalty clause is illegal, unenforceable and void as a "hot cargo" provision under Section 8(e) of the Labor-Management Relations Act, 29 U.S.C. § 158(e); that is, an implied agreement to cease doing business with non-signatory employees and signatories which are delinquent in Fund contributions. Kaiser also urges that the *Kelly* v. *Kosuga* decision permits the interposition of the defense of antitrust illegality under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 because the contract provision relied upon by the Trustees is itself unlawful.[6]

Finally, the Trustees argue that the Court is without jurisdiction to hear a Section 8(e) defense and failing this, that several disputed issues of material fact preclude summary judgment in favor of Kaiser.

---

[6] The antitrust defense has been briefed by the parties only with reference to the decision in *Kelly* v. *Kosuga*, 358 U.S. 516, 79 S.Ct. 429, 3 L.Ed.2d 475 (1959) and the availability of an antitrust defense to an action to recover pension contributions on an expired contract. Motion of Kaiser Steel Corporation for Summary Judgment at 2 n.2. Several other defenses raised by way of answer have not been argued by Kaiser. The Court finds the defenses of standing and failure to join an indispensable party to be without merit. *See Lewis* v. *Quality Coal Corp.*, 243 F.2d 769, 772-73 (7th Cir. 1957); *Paul* v. *Lindgren*, 375 F.Supp. 843, 849 (N.D. Ill. 1974).

Antitrust Defense

The decision in *Kelly* v. *Kosuga*, 358 U.S. 516, 79 S.Ct. 429, 3 L.Ed.2d 475 (1959) restated the position of the United States Supreme Court regarding recognition of a defense of antitrust illegality to an action brought on a contract. In *Kelly*, as in prior decisions, the Court attempted to accommodate the competing interests involved: enforcement of a contract provision which may in itself be unlawful or in furtherance of illegal ends and thereby frustrating public policy, or denial of recovery which may result in unjust enrichment at the plaintiff's expense or otherwise impose a penalty unrelated to the character of plaintiff's illegal acts and thereby give defendant a windfall.

The contract sued upon in *Kelly*[7] provided for the sale of fifty carloads of onions at market price to an onion grower and included an agreement by the vendor not to deliver onions on the futures market in order to maintain artificially high prices. This contract was one aspect of a larger price maintenance scheme in which other onion growers purchased additional onions from the vendor and then agreed among themselves not to market the onions. The vendee accepted delivery of thirteen carloads but only made partial payment before refusing delivery of the remaining thirty-seven carloads. After repudiation by the vendee, the vendor sold the rapidly deteriorating onions at a reduced price in mitigation of damages and brought suit on the contract for the unpaid purchase price. The vendee argued that the sale was made pursuant to and as an indivisible part of an agreement restraining trade in violation of the Sherman Act. Plaintiff's motion to strike this affirmative defense was granted by the trial court which rendered summary judgment for the plaintiff.

---

[7] The opinion of the Seventh Circuit Court of Appeals in *Kosuga* v. *Kelly*, published at 257 F.2d 48, amplifies the factual background giving rise to the litigation.

The Supreme Court upheld a judgment for the contract price in favor of the vendor and stated:

> As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. This has been notably the case where the plea has been made by a purchaser in an action to recover from him the agreed price of goods sold.

358 U.S. at 518, 79 S.Ct. at 431. The Court noted its extreme reluctance to supplement the express remedies provided by the antitrust laws with an additional remedy of contract avoidance and also restated the limits of the defense of antitrust illegality:

> Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the [Sherman] Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, "of preventing people from getting other people's property for nothing when they purport to be buying it." . . . Supplying a sanction for the violation of the Act, not in terms provided and capricious in its operation, is avoided by treating the defense as so confined (citations omitted).

358 U.S. at 520-21, 79 S.Ct. at 432.

The general rule emerging from *Kelly* is that a contract should be enforced whether or not it fosters illegal ends, unless the alleged illegality is of such a character that enforcement of the contract would "make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act." 358 U.S. at 520, 79 S.Ct. at 432. The extreme difficulty confronting Kaiser in attempting to demonstrate that the purchase-of-coal clause falls within the narrow exception noted in *Kelly* is underscored by the fact that the Supreme Court has sustained the defense of antitrust illegality on only one occasion. The unique factors present in *Continental Wall Paper Co.* v. *Louis Voight & Sons Company*, 212 U.S.

227, 256, 29 S.Ct. 280, 290, 53 L.Ed. 486 (1909) which led the Court to condemn a monopolization and price-fixing scheme characterized as "certain in results . . . widespread in its operation, and . . . evil in its purposes" and to sustain an antitrust defense to a contract action are not present in this case. *See D. R. Wilder Manufacturing Company* v. *Corn Products Refining Company*, 236 U.S. 165, 177, 35 S.Ct. 398, 59 L.Ed. 520 (1915).

In similar decisions preceding *Kelly* v. *Kosuga*, the Supreme Court sought to reconcile conflicting policies underlying antitrust law and contract principles by adhering to a difficult formula distinguishing between enforceable "collateral" agreements not illegal in themselves and "inherently" illegal agreements. *Compare Continental Wall Paper Co., supra*, with *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 22 S.Ct. 431, 46 L.Ed. 679 (1902). The *Kelly* decision signals abandonment of this troublesome test and in its place the Supreme Court has invited attention to the nature of the remedy sought as the touchstone for determining whether or not an alleged antitrust illegality should counsel a court to refuse assistance to a party presenting a contractual claim.[8] *See Kelly* v. *Kosuga*, 358 U.S. at 521, 79 S.Ct. 429.

---

[8] In so holding the Court relied on *Corbin on Contracts* which explains:

> There are cases in which the making of a bargain may be prohibited, even though the performances agreed upon are all perfectly lawful . . . . [For example], problems arise with respect to a bargain in unreasonable restraint of trade, the bargain being illegal although the performances promised are not; also with respect to the transaction of business without a license. It will be found that the determination of divisibility may depend as much upon the remedy that is sought (specific performance, injunction, damages, restitution, etc.) as upon the nature and extent of the illegality. 6A *Corbin on Contracts* § 1520 at 755-56 (1962).

The Trustees are seeking to recover one component of agreed compensation pursuant to the terms of a contract which has expired. The amounts claimed are based on purchases actually made. The contract is at an end—decisions to purchase or not to purchase have been made and acted upon. Whether or not an express or implied agreement not to make *future* purchases of coal, like the nondelivery agreement referred to in *Kelly* at 521, 79 S.Ct. 429, would warrant a different result, the Court concludes that requiring payments pursuant to the purchase-of-coal clause cannot be said to be enforcing a restraint of trade within the meaning of *Kelly* v. *Kosuga.*[9]

The "Hot Cargo" Defense

The Court disagrees with the arguments advanced by Kaiser concerning the proper application of Section 8(e) and concludes that Section 8(e) is not a bar to recovery by the Trustees under the facts and circumstances of this case.

In deciding whether or not to allow the interposition of a Section 8(e) defense, the Court is guided by *San Diego Building Trades Council et al.* v. *Garmon et al.*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). Thus, when an activity is arguably subject to Section 8 of the National Labor Relations Act, federal courts must defer to the exclusive competence of the NLRB. This is true, where as here, an aggrieved party declines to bring allegedly illegal Section 8 activity to the attention of the NLRB or, as noted in *Garmon*, where the NLRB failed to determine the status of the allegedly unlawful conduct. *Id.* at 245-46, 79 S.Ct. 773.

---

[9] The Court notes that Kaiser has failed to seek affirmative relief by availing itself of the powerful treble damage remedy provided for claimants who can demonstrate injury resulting from a restraint of trade such as that alleged here by way of defense.

Congress enacted Section 8(e) in order to plug a "loophole" in the law of "secondary boycotts" recognized by the Supreme Court in *Local 1976, United Brotherhood of Carpenters* v. *NLRB* (*Sand Door*), 357 U.S. 93, 78 S.Ct. 1011, 2 L.Ed.2d 1186 (1958) in its interpretation of Section 8(b)(4)(B) of the Taft-Hartley Act of 1947, 29 U.S.C. § 158(b)(4)(B). *See National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967). The inclusion of "hot cargo" prohibitions within Section 8(e) along with the express introductory phrase "it shall be an unfair labor practice" suffice to create a presumption that, in enacting Section 8(e), Congress intended simply to expand the list of unfair labor practices subject to exclusive NLRB jurisdiction.

The addition of the "unenforceable and void" language without more cannot change the character of the "hot cargo" legislation so as to create a separate federal remedy not available in the enforcement of other unfair labor practices. As the Trustees point out in their Reply Memorandum at 11-12, the purpose of the "unenforceable and void" language "was to ensure that the 8(e) prohibitions would reach all contracts even those in effect at the time of the enactment of the legislation."

Examination of the relevant legislative history supports rather than detracts from this Court's tentative construction of Section 8(e) and its proper application to the case at bar. Kaiser's reference to Senator Goldwater's remarks on the impact of Section 8(e) fully comports with the Court's view that the Trustees are not seeking damages but are attempting to recover agreed upon compensation which is in part measured by the amount of coal purchased by Kaiser. *See* Kaiser Memorandum at 18, n.22 *quoting* II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 1857 (hereinafter "II Legislative History"). In addition, remarks made by Senator Kennedy, one of the

sponsors of the bill, indicate his belief that Section 8(e) was intended simply to create a new unfair labor practice enforceable by the NLRB:

> Tomorrow, after thinking about it overnight, we might decide whether we should consider giving priority to the handling of unfair practices arriving under this provision. We should consider whether we ought to give priority to any unfair labor practice charges which might come to the attention of the Board in this particular category.

II Legislative History at 1163.

Cases cited by Kaiser do not undercut the Courts' conclusion that it cannot entertain a Section 8(e) defense. Decisions such as *Smith* v. *Evening News Association*, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962) only hold that "[t]he authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301." *Id.* at 197, 83 S.Ct. at 269. Thus, federal courts are not precluded from deciding contract claims under the express grant of jurisdiction under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, simply because the breach of contract might also be an unfair labor practice.

In *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975), the Court was not confronted with an agreement claimed to constitute an unfair labor practice involving complex questions of intent and effect. Rather the Court was presented a task for which it is ideally suited; that is, balancing the labor and antitrust policy while determining whether the construction industry proviso of Section 8(e) removed certain activity from the reach of the antitrust laws. The Court agrees with plaintiffs' observation that the "collateral" labor

law issue involved in *Connell* is very different from the question Kaiser is asking this Court to resolve, a question well beyond " 'the conventional experience of judges' " which raises issues " 'within the special competence' " of the NLRB. *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers* v. *Hardeman*, 401 U.S. 233, 238-39, 91 S.Ct. 609, 28 L.Ed. 2d 10 (1971).[10] *See Huge et al.* v. *Long's Hauling Co., Inc.*, 580 F.2d 457 (3d Cir. 1978).

The Court concludes that the record in this case does not raise any genuine issue of material fact and that the Trustees are entitled to summary judgment. An order reflecting the judgment of the Court and awarding appropriate relief, including the award of reasonable attorneys' fees, has been entered previously.

---

[10] The memoranda submitted by the parties demonstrate that the issues raised by the attempt to enforce the purchase-of-coal clause are of central importance to the national labor policy and that the NLRB has consistently exercised its jurisdiction to resolve Section 8(e) issues raised throughout the evolution of the purchase-of-coal clause.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil No. 78-0650

No. 79-1463

JULIUS MULLINS, *et al.*

v.

KAISER STEEL CORPORATION,
Appellant

Appeal from the United States District Court
for the District of Columbia

Before: WILKEY and MIKVA, Circuit Judges, and FLANNERY *, United States District Judge for the District of Columbia

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof: It is ordered and adjudged by this Court that the judgment of the District Court ap-

---

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

pealed from in this cause is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: September 17, 1980

Opinion for the Court filed by Circuit Judge Mikva

Dissenting opinion filed by Circuit Judge Wilkey

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1980

Civil Action 78-0650

No. 79-1463

JULIUS MULLINS, *et al.*

v.

KAISER STEEL CORPORATION,
Appellant

Before: Wilkey and Mikva, Circuit Judges and Flannery *, U.S. District Court Judge for the District of Columbia

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED, by the Court, that appellant's aforesaid petition is denied.

Per Curiam

For the Court:
/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Entered November 12, 1980.

---

* Sitting by designation pursuant to Title 28 U.S. Code Section 292(e). Circuit Judge Wilkey voted to grant the petition for rehearing.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1980

Civil Action 78-0650

No. 79-1463

JULIUS MULLINS, *et al.*

v.

KAISER STEEL CORPORATION,
Appellant

Before: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

The suggestion for rehearing en banc filed by appellant having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, *en banc*, that appellant's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:
/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Entered November 12, 1980.

Circuit Judges Tamm, MacKinnon, Robb and Wilkey would grant the suggestion for rehearing *en banc* for the reasons stated in Judge Wilkey's dissent to the panel opinion.

APPENDIX E

STATUTES INVOLVED

Section 8(e) of the Labor-Management Relations Act, 29 U.S.C. § 158(e), provides:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, provides in relevant part:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132, provides in relevant part:

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

* * * *

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

* * * *

(g) In any action under this subchapter by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

Office-Supreme Court, U.S.
FILED
JUL 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

JOINT APPENDIX

(List of counsel on inside cover)

PETITION FOR CERTIORARI FILED FEBRUARY 10, 1981
CERTIORARI GRANTED MAY 4, 1981

ROBERT A. HAMMOND, III
A. DOUGLAS MELAMED *
LYNN BREGMAN
JOSEPH A. GRUNDFEST

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioner
Kaiser Steel Corporation

Of Counsel:

RICHARD GARY
General Counsel
Kaiser Steel Corporation
300 Lakeside Drive
Oakland, California 94666

STEPHEN J. POLLAK *
RALPH J. MOORE, JR.
WENDY S. WHITE
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

E. CALVIN GOLUMBIC
WALTER P. O'CONNELL
United Mine Workers of
America Health and
Retirement Funds
2021 K Street, N.W.
Washington, D.C. 20006
(202) 452-5000

Counsel for Respondents
Julius Mullins et al.

Of Counsel:

SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036

July 8, 1981

* *Counsel of Record*

TABLE OF CONTENTS

Page

I. Relevant Docket Entries in the United States Court of Appeals for the District of Columbia Circuit in *Julius Mullins et al.* v. *Kaiser Steel Corp.*, No. 79-1463 1

II. Relevant Docket Entries in the United States District Court for the District of Columbia in *Julius Mullins et al.* v. *Kaiser Steel Corp.*, C.A. No. 78-0650 5

III. Relevant Pleadings and Other Items from the District Court Record 9

1. Plaintiffs' Complaint, April 11, 1978, with excerpts from Exhibit A (National Bituminous Coal Wage Agreement of 1974) 9

2. Defendant's Answer, June 2, 1978 55

3. Plaintiffs' Motion for Summary Judgment, September 13, 1978 63

4. Plaintiffs' Statement of Uncontested Material Facts, September 13, 1978 67

5. Notice of Appeal by Defendant, March 27, 1979 75

IV. Order of the United States Supreme Court Granting Petition for Certiorari, filed May 4, 1981 79

V. Letter from Clerk of the United States Supreme Court Granting Extensions of Time in Which To File Briefs, May 12, 1981 83

TABLE OF CONTENTS—Continued

Pet. App. Page

VI. The following decisions, opinions and orders have been omitted in printing this Joint Appendix because they appear as Appendices to the Petition for a Writ of Certiorari in No. 80-1345, at the following pages:

—Opinion of the United States Court of Appeals for the District of Columbia Circuit in *Mullins* v. *Kaiser Steel Corp.*, No. 79-1463, September 17, 1980 ..... 1a

—Order, February 28, 1979, and Memorandum Opinion, March 9, 1979, of the United States District Court for the District of Columbia in *Mullins* v. *Kaiser Steel Corp.*, C.A. No. 78-0650 ..... 68a

—Judgment of Court of Appeals in *Mullins* v. *Kaiser Steel Corp.*, No. 79-1463, September 17, 1980 ..... 81a

—Orders of Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing En Banc, November 12, 1980 ..... 83a

I.

RELEVANT DOCKET ENTRIES

in the

United States Court of Appeals (D.C. Cir.)

in

Julius Mullins et al.* v. *Kaiser Steel Corp.

No. 79-1463

RELEVANT DOCKET ENTRIES (D.C. CIR.)

DATE	FILINGS—PROCEEDINGS
1979	
March 27	Appellant Kaiser Steel Corporation's Notice of Appeal
May 7	Certification of original record
June 18	Appellant's brief
June 18	Joint Appendix
Aug. 24	Brief of Appellees Julius Mullins *et al.*
Sept. 19	Appellant's reply brief
Dec. 18	Oral argument before Circuit Judges Wilkey and Mikva and District Judge Flannery
1980	
Sept. 17	Opinion for the Court filed by Circuit Judge Mikva
Sept. 17	Dissenting opinion filed by Circuit Judge Wilkey
Sept. 17	Judgment affirming district court's summary judgment
Oct. 1	Appellant's petition for rehearing and suggestion for rehearing en banc
Nov. 12	Order denying appellant's petition for rehearing (Circuit Judge Mikva and District Judge Flannery; Circuit Judge Wilkey voting to grant petition)
Nov. 12	Order denying appellant's suggestion for rehearing en banc (Chief Judge Wright and Circuit Judges McGowan, Robinson, Wald, Mikva, Edwards and Ginsburg; Circuit Judges Tamm, MacKinnon, Robb and Wilkey voting to grant suggestion)

DATE	FILINGS—PROCEEDINGS
1980	
Nov. 17	Appellant's motion to stay issuance of mandate
Dec. 5	Order staying issuance of mandate pending application for petition for certiorari
1981	
Feb. 12	Certified copy of notice from Clerk, Supreme Court, advising that the petition for certiorari was filed on February 10, 1981 in SC No. 80-1345

II.

RELEVANT DOCKET ENTRIES

in the

United States District Court (D.D.C.)

in

Julius Mullins et al. v. *Kaiser Steel Corp.*

C.A. No. 78-0650

RELEVANT DOCKET ENTRIES (D.D.C.)

DATE		FILINGS—PROCEEDINGS
1978		
April	11	Complaint of plaintiffs Julius Mullins *et al.*; Exhibit A
June	2	Defendant Kaiser Steel Corporation's motion to transfer to a more convenient forum; memorandum in support of motion; affidavit of S.W. Zanolli
June	2	Defendant's Answer
June	27	Plaintiffs' opposition to defendant's motion to transfer to a more convenient forum; Exhibits A, B, C; affidavit of Martin B. Danzinger; Exhibit A; attachment
July	5	Defendant's reply in support of motion to transfer to a more convenient forum
Aug.	7	Order denying defendant's motion to transfer to a more convenient forum (Green, J.)
Sept.	13	Plaintiffs' motion for summary judgment; memorandum in support of motion; statement of material facts; six exhibits; affidavit of Martin B. Danzinger
Oct.	30	Defendant's motion for summary judgment; memorandum in support of motion and in opposition to plaintiffs' summary judgment motion; statement of material facts; affidavit of Robert Delaney; eight attachments; affidavit of Roger M. Haynes; affidavit of Charles M. Heath; affidavit of R. Heath Larry, Attachment A; affidavit of S.W. Zanolli, Attachments 1-6

DATE		FILINGS—PROCEEDINGS
1978		
Dec.	1	Plaintiffs' reply memorandum in support of motion for summary judgment; memorandum in opposition to defendant's motion for summary judgment; affidavits of Thomas N. Bethell, with Exhibits 1-8; Robert T. Boylan; Jerry N. Clark; Harry Huge, with Exhibit A; Donald E. Pierce, Jr.; and James D. Maddy in support of reply memorandum and memorandum in opposition to defendant's summary judgment motion; statement of genuine issues regarding the lawfulness of the purchase-of-coal clause under 29 U.S.C. § 158(e).
Dec.	20	Defendant's reply in support of motion for summary judgment
1979		
Mar.	6	ORDER filed by District Judge June Green, Feb. 28, 1979, granting plaintiffs' motion for summary judgment; denying defendant's motion for summary judgment; directing defendant to file remittance advice reports; directing defendant to pay the United Mine Workers of America Health and Retirement Funds the full amount due under the purchase-of-coal clause including interest on the amounts from the date they became due and owing; and directing defendant to pay plaintiffs their costs plus reasonable attorneys' fees
Mar.	9	Memorandum opinion filed by District Judge June Green
Mar.	27	Notice of Appeal by defendant from Order of Feb. 28, 1979

III.

RELEVANT PLEADINGS AND OTHER ITEMS FROM THE DISTRICT COURT RECORD

---

1. Plaintiffs' Complaint, April 11, 1978, with Excerpts from Exhibit A (National Bituminous Coal Wage Agreement of 1974)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0650

JULIUS MULLINS, KENNETH L. HOUCK, and PAUL R. DEAN, as Trustees of the UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, 2021 K Street, N.W. Washington, D.C. 20006 (202) 452-5000,
Plaintiffs,

v.

KAISER STEEL CORPORATION,
Defendant.

COMPLAINT FOR MONEY OWED AND OTHER RELIEF

1. This suit arises under and jurisdiction is founded upon Section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185, and Section 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132.

2. Plaintiffs Julius Mullins, Kenneth L. Houck, and Paul R. Dean are Trustees of the United Mine Workers of America 1950 Pension Trust, United Mine Workers of America 1950 Benefit Plan and Trust, United Mine Workers of America 1974 Pension Trust, and United Mine Workers of America 1974 Benefit Plan and Trust (hereinafter referred to collectively as "the Funds").

3. Plaintiffs conduct the business of the Funds at 2021 K Street, N.W., Washington, D.C. 20006. Venue lies in this Court under Section 502(e)(2) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(e)(2).

4. The Funds are employee welfare benefit plans and employee pension benefit plans within the meaning of Sections 3(1), (2), and (3), 4(a), and 502(a)(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1002(1), (2), and (3), 1003(a), and 1132(a)(3). Plaintiffs are fiduciaries within the meaning of Sections 3(21) and 502(a)(3) of said Act, 29 U.S.C. §§ 1002(21), 1132(a)(3).

5. Defendant Kaiser Steel Corporation is a corporation with a place of business at 300 Lakeside Drive, Oakland, California 96412. Since on or about December 6, 1974, defendant has been engaged in the production of coal and has employed persons represented by the International Union, United Mine Workers of America.

6. On or about December 6, 1974, defendant, certain other employers and associations, and the International Union, United Mine Workers of America entered into the National Bituminous Coal Wage Agreement of 1974 (hereinafter "1974 Agreement"), a copy of the provisions of which is attached hereto as Exhibit A and incorporated herein by reference. The 1974 Agreement is an agreement between an employer and a labor organization representing employees in an industry affecting commerce within the meaning of Section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185.

7. Article XX of the 1974 Agreement required that each employer party to the 1974 Agreement make contributions to the Funds based on the amount of coal produced by the employer, the hours worked by the employer's employees who perform classified work under the 1974 Agreement, and the amounts of coal procured or acquired by the employer for use or sale after production by another person when contributions to the Funds for that coal have not been made. Each employer party to the 1974 Agreement was required to submit to plaintiffs monthly statements showing, on a mine-by-mine basis, the full amounts due under Article XX

and the tons of coal produced, procured, or acquired for use or for sale and the hours worked with respect to which the amounts are payable (hereinafter "remittance advice reports").

8. Under Article XX of the 1974 Agreement, plaintiffs are authorized to audit the books and records of each employer party to the 1974 Agreement, to determine the amounts owed under Article XX of said Agreement, and to demand, collect, and receive such amounts.

9. Plaintiffs are informed and believe that defendant has produced, procured, and acquired coal but has failed and refused to make all contributions due to the Funds under Article XX of the 1974 Agreement. The amount of the required contributions which defendant has failed and refused to make is not known to said plaintiffs at this time.

10. Plaintiffs have demanded that defendants [sic] pay them the sums referred to in Paragraph 9 of this complaint, but the defendants have failed and continue to fail and to refuse to make such payment.

11. Defendant has failed to submit monthly remittance advice reports for coal procured or acquired on which contributions to the Funds have not been made, as it is required to do by Article XX of the 1974 Agreement.

12. Defendant's failure and refusal to make the payments described in paragraph 9 of this complaint to the Funds has caused and will cause the Funds to lose investment income and incur additional administrative expense.

WHEREFORE, plaintiffs Mullins, Houck, and Dean pray that this Court grant judgment for said plaintiffs as follows:

1. Requiring the defendant to file remittance advice reports covering coal procured or acquired for each month during the period covered by the 1974 Agreement;

2. Ordering the defendant to pay to the Funds the full amounts due under the 1974 Agreement, including interest on the amounts from the day they became due and owing;

3. Requiring the defendant in compliance with Article XX of the 1974 Agreement to present for inspection and/or copying all records pertaining to coal produced, procured, or acquired, and hours worked by defendant's employees, which are necessary to verify the amounts due and owing to the Funds;

4. Granting plaintiffs attorneys' fees, audit costs, and other costs and disbursements in this action; and

5. Granting plaintiffs such other and further relief as the Court may deem just.

Respectfully submitted,

/s/ Stephen J. Pollak
STEPHEN J. POLLAK
RALPH J. MOORE, JR.
FREDERICK C. SCHAFRICK
734 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 737-1255

HENRY S. RUTH, JR.
WALTER P. O'CONNELL
2021 K Street, N.W.
Washington, D.C. 20006
(202) 452-5032

Attorneys for Plaintiffs
Mullins, Houck, and Dean

Of Counsel:
SHEA & GARDNER
734 15th Street, N.W.
Washington, D.C. 20005

Dated: April 11, 1978

APPENDIX A

[Excerpts]

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1974

Article I—ENABLING CLAUSE

[Omitted]

ARTICLE II—SCOPE AND COVERAGE

Section (a) Work Jurisdiction

[Omitted]

Section (b) Exemptions Clause

[Omitted]

Section (c) Supervisors Shall Not Perform Classified Work

[Omitted]

Section (d) Management of the Mines

[Omitted]

Section (e) Union's Rights

[Omitted]

Section (f) Application of this Contract to the Employer's Coal Lands

[Omitted]

Section (g) Contracting and Subcontracting

[Omitted]

Section (h) Leasing, Subleasing and Licensing Out of Coal Lands

[Omitted]

Section (i) Construction Work

[Omitted]

ARTICLE III—HEALTH AND SAFETY

Section (a) Right to a Safe Working Place

[Omitted]

Section (b) Federal Coal Mine Health and Safety Act of 1969

[Omitted]

Section (c) Joint Industry Health and Safety Committee

[Omitted]

Section (d) Mine Health and Safety Committee

[Omitted]

Section (e) Access to the Mine

[Omitted]

Section (f) Reports

[Omitted]

Section (g) Safety Rules and Regulations

[Omitted]

Section (h) Cooperation in Development of Mining Plans

[Omitted]

Section (i) Preservation of Individual Safety Rights

[Omitted]

Section (j) Physical Examination

[Omitted]

Section (k) Minimum Age

[Omitted]

Section (l) Workmen's Compensation and Occupational Disease

[Omitted]

Section (m) Safety Equipment and Protective Clothing Allowance

[Omitted]

Section (n) Maintenance

[Omitted]

Section (o) Special Safety Problem Areas

[Omitted]

Section (p) Settlement of Health or Safety Disputes

[Omitted]

ARTICLE IV—WAGES AND HOURS

Section (a) Basic Work Week

[Omitted]

Section (b) Basic Work Day

[Omitted]

Section (c) Lampman

[Omitted]

Section (d) Saturday, Sunday and Premium Work

[Omitted]

Section (e) Standard Daily Wage Rate

[Omitted]

Section (f) Joint Commission on Job Evaluation, Job Grades, and Correction of Job Grade Inequities

[Omitted]

ARTICLE V—HELPERS ON FACE EQUIPMENT IN UNDERGROUND MINES

Section (a) Assignment of Helpers

[Omitted]

Section (b) Duties and Responsibilities of Helpers

[Omitted]

Section (c) Exemption

[Omitted]

Section (d) Implementation

[Omitted]

ARTICLE VI—SHIFTS AND SHIFT DIFFERENTIALS

Section (a) Multiple Shifts

[Omitted]

Section (b) Hoisting of Coal

[Omitted]

Section (c) Shift Differentials

[Omitted]

Section (d) Working into the Next Shift

[Omitted]

Section (e) Call-back

[Omitted]

Section (f) Shift Rotation

[Omitted]

ARTICLE VII—MINE COMMUNICATION COMMITTEES

[Omitted]

ARTICLE VIII—STARTING TIME

Section (a) Shift Starting Time

[Omitted]

Section (b) Lowering Employees

[Omitted]

Section (c) Safety and Maintenance

[Omitted]

Section (d) Surface Facilities

[Omitted]

Section (e) Crew Changes

[Omitted]

ARTICLE IX—ALLOWANCES

Section (a) Bereavement Pay

[Omitted]

Section (b) Jury Duty

[Omitted]

Section (c) Reporting Pay

[Omitted]

Section (d) Military Duty

[Omitted]

Section (e) Personal or Sick Leave

[Omitted]

Section (f) Christmas Bonus for 1974

[Omitted]

Section (g) Cost-of-Living Catch-Up Allowance

[Omitted]

ARTICLE X—COST-OF-LIVING ADJUSTMENT

Section (a) Entitlement

[Omitted]

Section (b) Definitions

[Omitted]

Section (c) Method of Computation

[Omitted]

Section (d) Limitations

[Omitted]

Section (e) Adjustments Made November 1, 1976 and Prior

[Omitted]

Section (f) Cost-of-Living Roll-in

[Omitted]

Section (g) Unavailability of Consumer Price Index

[Omitted]

Section (h) No Downward Adjustment

[Omitted]

Section (i) Cost-of-Living Schedule

[Omitted]

Section (j) Adjustment Dates

[Omitted]

Section (k) Adjustments Made After 2nd Anniversary Date of this Agreement

[Omitted]

ARTICLE XI—SICKNESS AND ACCIDENT BENEFITS

Section (a) General Purpose

[Omitted]

Section (b) Eligibility

[Omitted]

Section (c) Commencement and Duration of Benefits

[Omitted]

Section (d) Amount and Payment of Benefits

[Omitted]

Section (e) Filing of Claims for Benefits

[Omitted]

Section (f) Structure and Administration

[Omitted]

ARTICLE XII—HOLIDAYS

Section (a) Holidays Observed

[Omitted]

Section (b) Sunday Holidays

[Omitted]

Section (c) Monday Holidays

[Omitted]

Section (d) Pay for Holidays Worked

[Omitted]

Section (e) Pay for Holidays Not Worked

[Omitted]

Section (f) Holidays During Vacation Pay

[Omitted]

Section (g) Birthday Holidays

[Omitted]

Section (h) Holidays for Sick and Injured

[Omitted]

Section (i) Time of Payment

[Omitted]

ARTICLE XIII—REGULAR VACATION

Section (a) Annual Vacation

[Omitted]

Section (b) Dates of Regular Vacation Period

[Omitted]

Section (c) Staggered Regular Vacation

[Omitted]

Section (d) Qualifying Period and Amount of Payment

[Omitted]

Section (e) Floating Vacation Days

[Omitted]

Section (f) Time of Payment

[Omitted]

Section (g) Obligation for Payment

[Omitted]

Section (h) Work During Vacation Shutdown
[Omitted]

ARTICLE XIV—GRADUATED VACATION

Section (a) General
[Omitted]

Section (b) Definition of Additional Days
[Omitted]

Section (c) Definition of Continuous Employment
[Omitted]

Section (d) Amount of Continuous Employment
[Omitted]

Section (e) Time of Payment
[Omitted]

Section (f) Rate of Payment
[Omitted]

Section (g) Scheduling and Pay in Lieu
[Omitted]

Section (h) Sick and Injured Employees
[Omitted]

ARTICLE XV—CHECKOFF
[Omitted]

ARTICLE XVI—TRAINING

Section (a) Priority
[Omitted]

Section (b) Orientation of New Employees
[Omitted]

Section (c) General Retraining Programs
[Omitted]

Section (d) Safety Training for Specific Job
[Omitted]

Section (e) Maintenance Training and Rate of Pay
[Omitted]

Section (f) New Inexperienced Employees at Underground Mines
[Omitted]

Section (g) General Training Provisions
[Omitted]

ARTICLE XVII—SENIORITY

Section (a) Definition of Seniority
[Omitted]

Section (b) Reduction in Work Forces
[Omitted]

Section (c) Layoff Procedure
[Omitted]

Section (d) Panels
[Omitted]

Section (e) Panel Custodians
[Omitted]

Section (f) Panel Members Accrue Seniority
[Omitted]

Section (g) Right to be Recalled
[Omitted]

Section (h) Recall of Persons on Layoff Status
[Omitted]

Section (i) Job Bidding

[Omitted]

Section (j) Training for Vacancy Not Filled by Bidding

[Omitted]

Section (k) Transfer to Other Mines of Employer

[Omitted]

Section (l) Leave of Absence

[Omitted]

Section (m) Permanent and Temporary Supervisors

[Omitted]

Section (n) Shift Preference

[Omitted]

ARTICLE XVIII—TONNAGE RATES AND HAND LOADING

Section (a) Tonnage Rates

[Omitted]

Section (b) Checkweighmen

[Omitted]

Section (c) Preparation and Cleaning of Coal

[Omitted]

Section (d) Delivery of Cars

[Omitted]

Section (e) Explosives

[Omitted]

Section (f) Bottom Coal

[Omitted]

Section (g) Cutting Coal

[Omitted]

Section (h) Blacksmithing

[Omitted]

Section (i) Rockdusting

[Omitted]

Section (j) Day Men Transferred

[Omitted]

ARTICLE XIX—CLASSIFICATION

Section (a) Working in Classification

[Omitted]

Section (b) Classification Requirement

[Omitted]

Section (c) Temporary Assignments

[Omitted]

Section (d) Protection Against Discrimination

[Omitted]

Section (e) Compensation for Temporary Assignments

[Omitted]

ARTICLE XX—HEALTH AND RETIREMENT BENEFITS

[In Full]

Section (a) General Purpose

This Article makes provision for pension, health and other benefits for Employees covered by this Agreement,

and for former Employees who were covered under the United Mine Workers of America Welfare and Retirement Fund of 1950 ("1950 Fund"), and for the spouses and dependents of such Employees. The benefits to be provided are as set forth under separate plans and trusts described in Sections (b) and (c) of this Article.

A summary of the benefits to be provided appears immediately following this Article.

For purposes of this Article, the 1950 Pension Plan and Trust, the 1974 Pension Plan and Trust, the 1950 Benefit Plan and Trust and the 1974 Benefit Plan and Trust and each of them shall be a continuation of the UMWA Welfare and Retirement Fund of 1950 (hereinafter the 1950 Fund) provided that:

(1) The 1950 Pension Trust shall be solely responsible for all indebtedness, accounts payable, claims, causes of action and other liabilities (except as provided in (2) below) incurred or arising prior to December 6, 1974, and shall likewise be entitled and shall succeed to all assets held in trust by the 1950 Fund and all assets due the 1950 Fund on said date and to all rights heretofore accruing to or exercisable by the 1950 Fund;

(2) For all participants covered by the 1974 Pension Plan and Trust, the 1974 Pension Trust shall assume the liabilities for pensions including those arising out of past service credits attributable to employment prior to December 6, 1975.

Each participant and beneficiary shall be entitled only to the pension benefits provided in and paid from either the 1950 Pension Plan and Trust or the 1974 Pension Plan and Trust, and each participant, beneficiary and dependent shall be entitled only to the benefits provided in and paid from either the 1950 Benefit Trust or the 1974 Benefit Trust.

The general purpose of the plans established by this Article shall be to provide health care for working and retired miners and their dependents; pensions for miners upon their retirement; and health care and financial support for eligible disabled miners, miners' widows and surviving dependents as provided by each of the Trusts and Plans established under this Article.

It is agreed that the Trusts established in this Article are irrevocable Trusts created pursuant to, and within the scope of, Section 302(c) of the Labor-Management Relations Act, 1947, and they shall endure as long as the purposes for their creation shall exist.

Section (b) 1950 Plans and Trusts

Effective December 6, 1974, the name of the 1950 Fund is changed to the United Mine Workers of America 1950 Pension Trust ("1950 Pension Trust"). The 1950 Pension Trust is incorporated by reference and made a part of this Agreement. The terms of the 1950 Fund are hereby amended by substituting the terms of the 1950 Pension Trust and of the United Mine Workers of America 1950 Pension Plan ("1950 Pension Plan"). The 1950 Pension Plan is incorporated by reference and made a part of this Agreement. The pensions to be paid from the 1950 Pension Trust are as set forth in the 1950 Pension Plan.

Effective December 6, 1974, there is established a benefit plan and trust, which trust shall be known as the United Mine Workers of America 1950 Benefit Plan and Trust ("1950 Benefit Trust"). The 1950 Benefit Trust is incorporated by reference and made a part of this Agreement. The 1950 Benefit Trust provides health and other benefits, not including pension benefits, and the terms and conditions under which those benefits will be provided are as set forth in the plan under the 1950 Benefit Trust.

Upon the discharge of all its obligations, any remaining assets in either the 1950 Benefit Trust or the 1950 Pension Trust shall, upon termination of such Trusts, be transferred to the 1974 Benefit or Pension Trusts, respectively.

Section (c) 1974 Plans and Trusts

(1) Effective December 6, 1974, there is established a pension trust to be known as the United Mine Workers of America 1974 Pension Trust ("1974 Pension Trust"), which is incorporated by reference and made a part of this Agreement. The pensions to be paid from the 1974 Pension Trust are as set forth in the United Mine Workers of America 1974 Pension Plan ("1974 Pension Plan"), which is incorporated by reference and made a part of this Agreement. This Plan is a continuation of the pension program of the 1950 Fund and is effective December 6, 1974.

(2) Effective December 6, 1974, there is established a benefit plan and trust, which trust shall be known as the United Mine Workers of America 1974 Benefit Plan and Trust ("1974 Benefit Trust"). The 1974 Benefit Trust is incorporated by reference and made a part of this Agreement. The 1974 Benefit Trust provides health and other benefits, not including pension benefits, and the terms and conditions under which those benefits will be provided are as set forth in the plan under the 1974 Benefit Trust.

Section (d) Contributions by Employers

(1) During the life of this Agreement, for the periods of time indicated below, each signatory Employer engaged in the production of coal shall contribute to the Trusts established in this Article the amounts specified below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal produced by such Employer for use or for sale, and, in addition, each

signatory Employer (including those engaged in the production of coal and those not engaged in the production of coal) shall contribute to the Trusts established in this Article the amounts specified below based on cents per hour worked by each of the Employer's Employees who perform classified work under this Agreement:

(i) Into the 1950 Pension Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 56.0¢ per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, 52.4¢ per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 55.4¢ per ton on each such ton;

(ii) Into the 1950 Benefit Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 18.0¢ per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, 18.0¢ per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 19.0¢ per ton on each such ton;

(iii) Into the 1974 Pension Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 19.2¢ per hour on each such hour worked; for the period beginning December 6, 1975, and ending December 6, 1976, 7.6¢ per ton on each such ton, plus 63.0¢ per hour on each such hour worked; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 7.6¢ per ton on each such ton, plus 66.0¢ per hour on each such hour worked; and

(iv) Into the 1974 Benefit Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 70.8¢ per hour on each such hour worked; for the period beginning December 6, 1975, and ending December 6, 1976, 77.0¢ per hour on each such hour worked; and for the period beginning December 6, 1976, and ending when

this Agreement is terminated, 88.0¢ per hour on each such hour worked;

(v) In the event that the 1950 Pension Trust, the 1950 Benefit Trust, the 1974 Pension Trust and the 1974 Benefit Trust are not established on the date that any contributions become payable under this Agreement, such contributions shall be paid to the 1950 Fund.

In addition to the contributions indicated above, during the life of the Agreement, each signatory Employer shall, for the periods of time indicated below, contribute to the Trusts established in this Article in the amounts shown below based on cents per ton on each ton of two thousand (2,000) pounds of bituminous coal after production by another operator, procured or acquired by such Employer for use or for sale on which contributions to the appropriate Trusts as provided for in this Article have not been made (amounts shown below include cents per hour worked contributions converted to tonnage equivalents):

(i) Into the 1950 Pension Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 56.0¢ per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, 52.4¢ per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 55.4¢ per ton on each such ton;

(ii) Into the 1950 Benefit Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 18.0¢ per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, 18.0¢ per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 19.0¢ per ton on each such ton;

(iii) Into the 1974 Pension Trust: for the period beginning December 6, 1974, and ending December 6, 1975,

9.4¢ per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, 38.0¢ per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 38.9¢ per ton on each such ton; and

(iv) Into the 1974 Benefit Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 34.8¢ per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, 37.2¢ per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 41.7¢ per ton on each such ton.

(v) In the event that the 1950 Pension Trust, the 1950 Benefit Trust, the 1974 Pension Trust and the 1974 Benefit Trust are not established on the date that any contributions become payable under this Agreement, such contributions shall be paid to the 1950 Fund.

The parties hereto mutually agree that, if at any time during the term of this Agreement a court or tribunal of competent jurisdiction determines by a final decision that is not appealable that the provision appearing in the paragraph just preceding is invalid or in violation of the National Labor Relations Act, 1947, as amended, or other Federal or state law, the parties shall, at the option of and upon demand by the Union without affecting the integrity of any other provision of this Section or any other provision of the National Bituminous Coal Wage Agreement, meet and engage in good faith negotiations to agree upon a clause to be inserted into this Agreement in replacement of the provision found invalid or unlawful.

Definition of Hours Worked

Hours of work for purposes of Employer contributions to the various Health and Retirement Trusts shall include all hours worked, or fractions thereof, by Em-

ployees in a classified job covered by this Agreement. Hours actually worked for which a premium pay of any type is provided shall be treated for purposes of Employer contributions to the Trusts as though worked on a straight-time basis. Reporting pay for hours not actually worked shall not be included for the purpose of making Employer contributions to the Trust.

At any time during the term of this Wage Agreement, the Employers and the Union may agree upon a reallocation of contributions to be paid under the respective subdivisions (i) and (ii) in this Section, which will increase the cents per ton to be contributed into the 1950 Pension Trust and correspondingly will decrease the cents per ton to be contributed by the Employers into the 1950 Benefit Trust, or which will decrease the cents per ton to be contributed into the 1950 Pension Trust and correspondingly will increase the cents per ton to be contributed by the Employers into the 1950 Benefit Trust, provided that notice shall be given to the contributing Employers of the cents per ton to be allocated to each such Trust at least 30 days prior to the date the contributions become due and owing to the respective Trusts, subject to the following terms and conditions:

(a) No monies previously paid into or due and owing to either Trust nor any assets of either Trust shall be transferred to the other Trust:

(b) No decrease in the cents per ton to be contributed to the 1950 Pension Trust shall be adopted which can reasonably be expected to cause the 1950 Pension Trust and Pension Plan to fail to meet the minimum funding standards set forth in Section 302 of Title I, Subtitle B, Part 3, of ERISA or Section 1013 of Title II, Subtitle A, Part I of ERISA, or to fail to satisfy any applicable provisions of the Internal Revenue Code of 1954, including Sections 401 and 501 of said Code:

(c) No increase in the cents per ton to be contributed to the 1950 Pension Trust shall be adopted which will increase the contributions of the Employers to such Trust to an amount in excess of those amounts which, for Federal income tax purposes, are fully deductible by said Employers when paid into such Trust, pursuant to the provisions of the Internal Revenue Code of 1954;

(d) No reallocation of the contributions to be paid to the two Trusts shall be made which will increase the total combined contributions required by this Article to be made by the Employers to those two Trusts; and

(e) No decrease in the cents per ton to be contributed to the 1950 Benefit Trust shall be adopted which will result in any substantial reduction of the benefits currently provided in the 1950 Benefit Trust, nor shall any change in the cents per ton to be contributed to the 1950 Benefit Trust be adopted which will cause the contributions of the Employers to such Trust not to be fully deductible as paid or accrued under the applicable provisions of the Internal Revenue Code of 1954.

(2) The Trustees are hereby directed to establish a royalty rate or rates for bituminous coal which is recovered from slurry ponds, sludge piles, and other coal refuse, which is sold during the life of this Agreement, and such royalty rate will be paid on each ton of such coal recovered for use or for sale. Royalty rates currently being paid for coal recovered from slurry ponds, sludge piles and other coal refuse shall remain in effect unless and until changed by the Trustees. All royalties payable by Employers pursuant to this paragraph shall be divided among the 1950 Benefit Trust, the 1974 Benefit Trust, the 1950 Pension Trust and the 1974 Pension Trust in proportion to the total contribution paid to each such Trust by all Employers for the month preceding the month in which such royalty is due and payable.

(3) The obligation under this Section of any Employer signatory hereto shall be to contribute the amounts specified in this Section.

(4) The obligation to make payments to the Trusts specified in this Article shall become effective on the dates specified in the respective Subdivisions (i) through (v) of this Section, and the first payments are to be made on the 10th day of each month after such specified dates, and thereafter continuously on the 10th day of each succeeding calendar month.

(5) It shall be the duty of each of the Employers signatory hereto to keep current said payments due to the Trusts, and to furnish to the International Union, United Mine Workers of America and to the Trustees of those Trusts a monthly statement showing on a mine-by-mine basis the full amounts due hereunder and the tons of coal produced, procured or acquired for use or for sale and the hours worked with respect to which the amounts are payable. Payments to those Trusts shall be made by check payable, as appropriate, to:

"Trustees of the United Mine Workers of America 1950 Pension Trust"

"Trustees of the United Mine Workers of America 1950 Benefit Trust"

"Trustees of the United Mine Workers of America 1974 Pension Trust"

"Trustees of the United Mine Workers of America 1974 Benefit Trust"

The Trustees are hereby authorized to require each signatory Employer to make payment of all contributions to the 1950 Benefit Trust, the 1974 Benefit Trust, the 1950 Pension Trust and the 1974 Pension Trust by a single check made payable in such manner as may be specified by the Trustees.

(6) Payments shall be delivered or mailed to the office of the Trusts currently located at 2021 K Street, N. W., Washington, D. C. 20006, or as otherwise designated by the Trustees of those Trusts.

(7) Failure of any Employer signatory hereto to make full and prompt payments to the Trusts specified in this Article in the manner and on the dates herein provided shall be deemed a violation of this Agreement. This obligation of each Employer signatory hereto, which is several and not joint, to so pay such sums shall be a direct and continuing obligation of said Employer during the life of this Agreement and it shall be deemed a violation of this Agreement, if any mine, preparation plant or other facility to which this Agreement is applicable shall be sold, leased, subleased, assigned, or otherwise disposed of for the purpose of avoiding any of the obligations hereunder.

(8) Each Employer agrees to give proper notice to the President of the local union at the mine by the 18th day of each month that the Employer has made the required payment to the Trusts for the previous month, as required by this Article, or is delinquent in such payment, such notice to set forth the amount paid to the Trusts, or the amount of the delinquency, the tonnage produced and the hours worked with respect to the mine or mines under the jurisdiction of such local union.

(9) Title to all the monies paid into and/or due and owing to the Trusts specified in this Article shall be vested in and remain exclusively in the Trustees of those Trusts. It is the intention of the parties hereto that those Trusts shall constitute irrevocable trusts and that no benefits or money payable from those Trusts shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and that any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void.

(10) It is understood that the individual Employees of Employers agree, through their representative, the United Mine Workers of America, to surrender any personal or individual right to or interest in monies paid or required to be paid to the Trusts pursuant to these agreements (which monies might otherwise have been paid for wages or other benefits to such Employees), in consideration of the benefit which is provided by the pooling of such monies into common funds to be applied to the benefit of the designated beneficiaries pursuant to the Trust instruments.

(11) Any judgment obtained by the Trustees of the Trusts established pursuant to this Agreement for a default giving rise to damages accruing to more than one of the Trusts established hereunder shall be allocated by the Trustees among such Trusts in proportion to the amounts owing to each which gave rise to such judgment.

Section (e) Responsibilities and Duties of Trustees

(1) Each Trust shall be administered by a Board of three Trustees, one of whom shall be appointed by the Employers; one of whom shall be appointed by the Union; and one of whom shall be a neutral party, selected by the other two. The Trustees, or their duly appointed successors, shall serve for the duration of the Agreement and as long thereafter as the proper continuation and administration of the Trusts shall require. The representative of the Employers on the Board of Trustees shall be C. W. Davis, Bluefield, West Virginia; the representative of the Union on said Board of Trustees shall be Harry Huge, Washington, D.C.; and Paul R. Dean, Washington, D.C., is appointed as the neutral Trustee. Said three Trustees so named and designated shall constitute the Board of Trustees to administer the Trusts.

(2) It is the intent and purpose of the contracting parties that full cooperation shall be given by each of them to

one another, to the Trustees provided for under this Article, and to all affected mine workers, to the eventual coordination and development of policies and working agreements necessary or advisable for the effective operation of the Trusts and Plans.

(3) Action which may be required by the Employers in connection with any matter hereunder, including but not limited to the appointment of a successor Trustee, may be taken by those Employers who are parties to this Agreement, and authorization, approval or ratification of Employers representing fifty-one per cent (51%) or more of the total contributions made to the Trusts during the calendar year (or such shorter period which may have elapsed after the effective date of this Agreement) previous to that in which the action is taken shall be sufficient and shall bind all Employers.

(4) All covenants, rights and obligations accruing to the Trusts, and Benefit Plans, and the Trustees of the Pension and Benefit Trusts and Plans, and all breaches, violations and/or defaults of any provision of this Article pertaining to the Trusts and Plans, the Trust Agreements, or Pension Plans, shall be enforced by the Trustees, at their discretion, through any and all available legal means, without first exhausting the grievance and arbitration procedures set forth in this Agreement, and such Trustees shall determine whether any provision of this Article pertaining to the Trusts and Plans, the Trust Agreements or Pension Plan has been breached, violated or is in default.

Section (f) Audits, Reports and Notices

(1) It is agreed by the contracting parties that annual independent audits of the Trusts shall be made by independent certified public accountants to be designated by the Trustees of the Trusts. A statement of the results of such audits shall be sent to the contracting parties and

shall be made available upon written request to any working or retired miner or to any beneficiary either by mail or at the principal office of the Trusts, or at such other place as may be designated by the Trustees.

(2) If the Trustees determine that there is reasonable cause to question the accuracy of the sums paid under Section (d) of this Article, or of any verification thereof made by an Employer for a given monthly or annual period, the Employer shall, upon written request by the Trustees, make available for inspection and/or copying at reasonable times and places to a representative of the Trustees, those records which are necessary to verify the accuracy of the sums paid.

(3) A complete accounting, on a mine-by-mine basis, of contributions received by the Trusts under this Article shall be furnished by the Trustees, at least on a quarterly basis, to the International Union. Such an accounting will also be supplied to the District and Local offices of the Union with respect to the mine or mines under their jurisdiction. Such accountings shall include tonnages of coal produced and hours worked with respect to which contributions were paid, together with an identification of any period or periods in which contributions were delinquent, showing the amounts of such delinquencies. The Trustees shall take such action as they deem appropriate to collect any such delinquencies, and shall advise the International Union and the appropriate Districts and Locals of the Union, on at least a monthly basis, of such delinquencies, as long as such delinquencies continue.

(4) Upon the written request of any International, District or Local officer of the Union, the Trustees shall make available within seven (7) days of receipt of such request an up-to-date accounting of contributions made and delinquencies outstanding, in respect to any mine or related facility with respect to which such officer has union jurisdiction.

Section (h) Administration of Trusts

(1) Each Employer shall make available to the Trustees within a reasonable time such information as the Trustees may determine to be reasonably required for the purpose of administering the Trusts and Plans.

(2) The Trustees shall respond to all written requests for information, applications, and other communications from beneficiaries within 15 working days from their receipt at the office of Trusts. A response from the Trustees may be either a telephonic communication or a letter acknowledging receipt of such communication from the beneficiary. A pension application must be initially approved or denied within 12 weeks of the receipt of the application. The foregoing shall not apply in the event of delays caused by conditions beyond the control of the Trustees.

(3) Within six months after the effective date of this Agreement, the Trustees shall develop a suitable plan for policing and monitoring the rolls of those entitled to benefits from the Trusts. On at least a quarterly basis, the Trustees shall have available a complete listing of current beneficiaries, identified by UMWA district and local union jurisdiction, if applicable. The Trustees shall promptly investigate and determine the eligibility or ineligibility of any beneficiary whose right to receive benefits from the Trusts has been challenged by an Officer of the International, District or Local Union or by any Employer. In the event that a beneficiary or beneficiaries shall be determined to be ineligible for health care or other benefits, the Trustees shall take prompt action to correct the situation.

(4) Within six months after the effective date of this Agreement, the Trustees shall conduct a comprehensive review of procedures for monitoring covered medical expenses and shall report to the contracting parties with respect to insuring an effective system of cost controls,

especially regarding any fees charged by physicians, hospitals, clinics, pharmacists or others which appear to be excessive. The Trustees shall take such steps as they deem appropriate to improve such procedures, and shall report to the contracting parties on such activities regularly thereafter, at least annually.

(5) The Trustees are authorized, upon approval by the Employers and the Union, to make such changes in the Plans and Trusts hereunder as they may deem to be necessary or appropriate.

They are also authorized and directed, after adequate notice and consultation with the Employers and Union, to make such changes in the Plans and Trusts hereunder, including any retroactive modifications or amendments, which shall be necessary:

(a) to conform the terms of each Plan and Trust to the requirements of ERISA, or any other applicable federal law, and the regulations issued thereunder;

(b) to obtain determination letters from the Internal Revenue Service that the two Pension Trusts will each meet the requirements of Section 401 of the Internal Revenue Code and the Trusts thereunder will be exempt under Section 501(a) of such Code and that the two Benefit Trusts will be exempt under Section 501(c)(9) of such Code;

(c) to establish the deductibility for income tax purposes of any and all contributions made by the signatory operators to the Pension Trusts and Benefit Trusts as paid or incurred; or

(d) to comply with all applicable court or government decisions or rulings.

SUMMARY OF PRINCIPAL PROVISIONS, UMWA HEALTH AND RETIREMENT BENEFITS

(1) PENSIONS FOR MINERS WHO ARE ALREADY RETIRED:

Formerly at $150 per month, these pensions are to be increased according to the following schedules:

(a) For retired miners who receive state or federal black lung benefits, an immediate increase to $200 per month, with a second increase one year after the effective date of this Agreement to $215 per month, and a third increase two years after the effective date of this Agreement to $225 per month.

(b) For retired miners who do not receive state or federal black lung benefits, an immediate increase to $200 per month, with a second increase one year after the effective date of this Agreement to $225 per month, and a third increase two years after the effective date of this Agreement to $250 per month.

Any pensioned miner covered in this Plan will retain his Health Services card until death, and upon his death his widow will retain a Health Services card until her death or remarriage.

(2) PENSIONS FOR MINERS WHO RETIRE AFTER THE EFFECTIVE DATE OF THIS AGREEMENT BUT PRIOR TO JANUARY 1, 1976:

A working miner who retires after the effective date of this Agreement but prior to January 1, 1976 and who is eligible for a pension will receive the same benefit levels as set forth in paragraph (1).

(3) PENSIONS FOR MINERS WHO RETIRE IN 1976:

A working miner who retires at any time in 1976 and who is eligible for a pension under the terms of this Agreement will receive pension benefits based upon an entirely

new plan which provides credit for all years worked. Full credit is provided for years worked in mines of signatory Employers; partial credit is provided for years worked in mines of non-signatory Employers.

The earliest retirement age under this Plan will be 55. A miner may retire at 55 with 10 or more years of signatory employment.

Pension credits under the new plan are increased as a miner accumulates more years of employment. Benefits are also based upon a miner's age at the time of retirement with maximum benefits payable to miners who retire at the age of 62 or more.

In the first year of this pension plan (1976), the maximum credits are as follows:

- $12 per month multiplied by the years of signatory employment for the first 10 years of employment.
- $12.50 per month multiplied by the years of signatory employment for the second 10 years of employment.
- $13 per month multiplied by the years of signatory employment for the third 10 years of employment.
- $13.50 per month multiplied by the years of signatory employment for each year over 30 years of employment.

To estimate your pension under the terms of this new Plan, see the table on page 51.

Upon the death of a miner receiving a pension under this new Plan, his widow will receive a pension equal to 50 per cent of his pension until her death and will retain a Health Services card until her death or remarriage.

As a hedge against the anticipated increase in the cost of living, miners who retire under the new Plan during 1976 will receive a $10 per month increase in 1977.

(4) PENSIONS FOR MINERS WHO RETIRE IN 1977:

Benefits under the new Plan will be increased for miners retiring in 1977. Subject to the same terms as paragraph (3), the maximum benefit schedule applicable in 1977 will be as follows:

- $12.50 per month multiplied by the years of signatory employment for the first 10 years of employment.
- $13 per month multiplied by the years of signatory employment for the second 10 years of employment.
- $13.50 per month multiplied by the years of signatory employment for the third 10 years of employment.
- $14 per month multiplied by the years of signatory employment for each year over 30 years of employment.

If you retire in 1977, estimate your pension by referring to the table on page 51.

Upon the death of a miner receiving a pension under this new Plan, his widow will receive a pension equal to 50 per cent of his pension until her death and will retain a Health Services card until her death or remarriage.

(5) PENSIONS FOR DISABLED MINERS:

A miner who becomes permanently and totally disabled as the result of a mine accident after the effective date of this Agreement will become eligible for pension benefits according to the following schedule:

(a) If a miner has less than ten years of signatory employment at the time of his disabling accident, he will receive a $125-per-month pension for life, and will retain his Health Services card for life.

(b) If a miner has ten years or more of signatory employment at the time of his disabling accident, he will receive an increased pension based upon the years of credited employment which he has accumulated at the time of his disabling accident. If the disabling accident occurs after the effective date of this Agreement but prior to January 1, 1976, the initial pension payment will be $125 per month, but such amount will, effective January 1, 1976, be increased to the pension levels at age 62 shown in the table on page 51. If the disabling accident occurs on or after January 1, 1976, the initial pension levels at age 62 shown on page 51 will apply immediately. (For example, a miner disabled during this period of time who is age 44 and has 22 years of employment, would be eligible effective January 1, 1976 for a disability pension of $271 per month.)

If the disabling accident occurs in 1977, the higher schedule of benefits shown in the table on page 51 will apply. (In this case, the example Employee would receive $282 per month.)

(c) A miner who was permanently and totally disabled as the result of a mine accident after May 29, 1946, but prior to the effective date of this Agreement in a then signatory mine, will be eligible, upon application and certification of disability, for a pension of $125 per month for the rest of his life, and will be entitled to retain his Health Services card for life. Upon his death, his widow will retain a Health Services card until her death or remarriage.

(6) PENSIONS FOR WIDOWS:

The new Plan provides, for the first time, for widows' pensions. Benefits will ordinarily be payable according to the following schedule:

(a) If a miner working on or after January 1, 1976, becomes eligible for a pension at any time thereafter,

his widow will be entitled to receive a Surviving Spouse pension equal to 50 per cent of his pension until her death; she will retain a Health Services card until her death or remarriage.

(b) If, on or after January 1, 1976, a working miner dies (regardless of cause) and would have been eligible for an immediate pension had he retired on the date of his death, his widow will be eligible for a pension equal to 50 per cent of the pension he would have received, and will receive his pension until her death; she will retain a Health Services card until her death or remarriage.

(7) DEFERRED VESTED PENSION:

If a working miner terminates his employment for any reason after completing 10 years of signatory employment, and before age 55, he will be eligible to receive a pension at age 62, or an actuarially reduced pension at any time after 55. The widow's pension described in paragraph (6) does not apply to the widow of a miner receiving a deferred vested pension.

(8) BASIC DEATH BENEFITS:

Under the terms of this Agreement, basic death benefits are substantially increased, and will be payable according to the following schedule:

(a) Upon the death of a working miner with one to five dependents, a death benefit of $7,500 will be paid to his widow, or, in the absence of a widow, to his surviving dependents.

(b) Upon the death of a working miner with more than five dependents, a death benefit of $8,000 to $10,000 will be paid to his widow (or, in the absence of a widow, to his surviving dependents), based on an incremental payment of $500 per dependent.

(c) Upon the death of a working miner with no dependents, a death benefit of $2,000 will be paid to his

nearest designated survivor, except that if the cause of death was any accident, the death benefit will be $7,500.

(d) Upon the death of a pensioned miner with dependents, a death benefit of $2,500 will be paid to his widow, or, in the absence of a widow, to his surviving dependents.

(e) Upon the death of a pensioned miner with no dependents, a death benefit of $2,000 will be paid to his nearest designated survivor.

(9) DEATH BENEFITS WHEN DEATH IS THE RESULT OF A MINE ACCIDENT:

If, after the effective date of this Agreement, a miner is killed in a mine accident, his widow will receive, in addition to the basic death benefit described above, a one-time cash payment of $10,000 plus $100 per month until her death or remarriage. These benefits will be in addition to any pension to which she may be entitled. In the event that there is no surviving spouse and there is one or more surviving dependent children, the above benefits will be payable to unmarried dependent children until age 22.

(10) HEALTH SERVICES CARD:

Regulations already in effect governing eligibility for Health Services cards are amended to include the following:

(a) A miner who (1) has completed 20 years of credited service, including the required number of years of signatory service, (2) has not attained age 55, and (3) is disabled and receiving Social Security disability insurance benefits will be eligible for a Health Services card.

(b) A working miner who becomes totally disabled due to a compensable disability within 4 years of the

date he would be eligible for retirement shall be entitled to a Health Services card while so disabled and during the period for which Workmen's Compensation payments are applicable.

(c) The widow of a miner who retired and received a pension at any time on or after May 29, 1946, will receive, upon approval of application, a Health Services card until her death or remarriage.

(d) The widow of a miner who became permanently and totally disabled as the result of injuries suffered in a mine accident at any time on or after May 29, 1946, will, upon approval of application, receive a Health Services card until her death or remarriage.

(e) The widow of a miner who is currently receiving a pension, or of a miner who receives a pension (other than a deferred vested pension based on less than 20 years of credited service) at any time after the effective date of this Agreement will upon his death retain a Health Services card until her death or remarriage.

(f) Disabled or retarded children of Health Services cardholders will be covered for life, so long as a surviving parent holds the card.

(11) HEALTH CARE:

All current programs administerd by the UMWA Health and Retirement Funds will be carried forward and expanded as required to cover additional beneficiaries.

The foregoing summary is subject to the complete description of all benefits provided pursuant to this Agreement, which will be found in the Pension and Health Plans and Trusts adopted as part of this Agreement and incorporated herein by reference under the title "UMWA Health and Retirement Benefits." In case of conflict, the provisions of the Plans and Trusts shall be governing.

ARTICLE XXI—SURFACE MINES

Section (a) Parking Areas

[Omitted]

Section (b) Manning of Surface Mining Equipment

[Omitted]

Section (c) Eating Place

[Omitted]

Section (d) Cabs

[Omitted]

Section (e) Special Health and Safety Problems in Surface Mines

[Omitted]

Section (f) Toilets

[Omitted]

Section (g) Swing Shift

[Omitted]

Section (h) Leasing of Employees' Vehicles

[Omitted]

Section (i) Production and Processing of Coal at Surface Mines

[Omitted]

ARTICLE XXII—MISCELLANEOUS

Section (a) Bathhouse

[Omitted]

Section (b) Access Roads

[Omitted]

Section (c) Parking Facilities

[Omitted]

Section (d) Bulletin Boards

[Omitted]

Section (e) Coke and Cleaning Plants

[Omitted]

Section (f) Compulsory Retirement

[Omitted]

Section (g) House Coal

[Omitted]

Section (h) House Rent

[Omitted]

Section (i) Irregular Work

[Omitted]

Section (j) Memorial Periods

[Omitted]

Section (k) Closing Following Fatal Accidents

[Omitted]

Section (1) New Machinery

[Omitted]

Section (m) Pay Dues

[Omitted]

Section (n) Lunches

[Omitted]

Section (o) Portals

[Omitted]

Section (p) Tools

[Omitted]

Section (q) Tramming

[Omitted]

Section (r) Local Union Meeting Place

[Omitted]

ARTICLE XXIII—SETTLEMENT OF DISPUTES

Section (a) Mine Committee

[Omitted]

Section (b) Arbitration Review Board

[Omitted]

Section (c) Grievance Procedure

[Omitted]

Section (d) Fifteen Day Limitation

[Omitted]

Section (e) Earnest Effort to Resolve Disputes

[Omitted]

Section (f) Employer's Right to Presence of Member of Mine Committee

[Omitted]

Section (g) Right of Grievant to be Present

[Omitted]

Section (h) Finality of Decision or Settlement

[Omitted]

Section (i) Exclusion of Legal Counsel

[Omitted]

Section (j) Expenses of Chief Umpire and Panel Umpires

[Omitted]

Section (k) Circulation of Approved Decisions

[Omitted]

Section (l) Waiver of Time Limits

[Omitted]

ARTICLE XXIV—DISCHARGE PROCEDURE

Section (a) Just Cause Required

[Omitted]

Section (b) Procedure

[Omitted]

Section (c) Suspension

[Omitted]

Section (d) Immediate Arbitration

[Omitted]

Section (e) Regular Arbitration

[Omitted]

Section (f) Compensation for Lost Earnings

[Omitted]

ARTICLE XXV—DISCRIMINATION PROHIBITED

[Omitted]

ARTICLE XXVI—DISTRICT AGREEMENTS

Section (a) New Districts of the United Mine Workers May Be Established

[Omitted]

Section (b) Prior Practice and Custom

[Omitted]

Section (c) Protective Wage Clause

[Omitted]

Section (d) Approval of District Agreements

[Omitted]

ARTICLE XXVII—MAINTAIN INTEGRITY OF CONTRACT AND RESORT TO COURTS

[Omitted]

ARTICLE XXVIII—NATIONAL CONFERENCES

[Omitted]

ARTICLE XXIX—SEVERABILITY CLAUSE

Section (a) General Rule

[Omitted]

Section (b) Exception

[Omitted]

ARTICLE XXX—RATIFICATION AND TERMINATION OF THIS AGREEMENT

[Omitted]

APPENDIX A—PART I

[Omitted]

APPENDIX A—PART II

[Omitted]

APPENDIX A—PART III

[Omitted]

APPENDIX B—PART I

[Omitted]

APPENDIX B—PART II

[Omitted]

APPENDIX B—PART III

[Omitted]

III.

2. Defendant's Answer

June 2, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0650

JULIUS MULLINS, *et al.*,
Plaintiffs,
v.
KAISER STEEL CORPORATION,
Defendant.

ANSWER OF DEFENDANT KAISER STEEL CORPORATION

Defendant Kaiser Steel Corporation ("Kaiser Steel") hereby answers the Complaint in Civil Action No. 78-0650 filed on or about April 11, 1978 (hereinafter "Complaint"), as follows:

First Defense

With respect to the numbered paragraphs of the Complaint, Kaiser Steel:

1. States that Paragraph 1 of the Complaint alleges conclusions of law which do not require answer but, if required, admits that plaintiffs purport to bring this suit under the statutes which they cite and denies that those statutes offer any basis for suit or that there is any other basis for suit.

2. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 2 of the Complaint and therefore denies those allegations.

3. Lacks knowledge or information sufficient to permit it to form a belief as to the truth of the allegations of the first sentence of Paragraph 3 of the Complaint and therefore denies those allegations. States that the second sentence of Paragraph 3 of the Complaint alleges con-

clusions of law which do not require answer but, if required, denies the allegations.

4. States that Paragraph 4 of the Complaint alleges conclusions of law which do not require answer but, if required, lacks knowledge or information sufficient to permit it to form a belief as to the truth of those allegations and therefore denies them.

5. Denies the allegations of the first sentence of Paragraph 5 of the Complaint, but states that Kaiser Steel Corporation is a corporation having its principal place of business at 300 Lakeside Drive, Oakland, California 94666. Admits the allegations of the second sentence of Paragraph 5 of the Complaint.

6. States that Paragraph 6 of the Complaint alleges conclusions of law which do not require answer.

7. States that Paragraph 7 of the Complaint alleges conclusions of law which do not require answer but, if required, admits that Section (d) of Article XX of the 1974 Agreement provides as set forth at pages 28-30 of Exhibit A to the Complaint and denies the remaining allegations of Paragraph 7 of the Complaint.

8. States that Paragraph 8 of the Complaint alleges conclusions of law which do not require answer but, if required, admits that Sections (f) (1) and (f) (2) of Article XX of the 1974 Agreement provide as set forth at page 30 of Exhibit A to the Complaint and denies the remaining allegations of Paragraph 8 of the Complaint.

9. Lacks knowledge or information sufficient to permit it to form a belief as to the truth of the allegations of Paragraph 9 of the Complaint concerning plaintiffs' information, belief, and knowledge and therefore denies them; admits that it has produced, procured and acquired coal; but denies the remaining allegations of Paragraph 9 of the Complaint.

10. Admits that plaintiffs have demanded that defendant make additional contributions to the Funds, but denies the remaining allegations of Paragraph 10 of the Complaint.

11. Admits that it has not submitted monthly remittance advice reports for coal procured or acquired, but denies the remaining allegations of Paragraph 11 of the Complaint.

12. Lacks knowledge or information sufficient to permit it to form a belief as to the truth of the allegations of Paragraph 12 of the Complaint and therefore denies them.

To the extent that any allegation of any of the paragraphs of the Complaint is not specifically admitted, it is denied.

Second Defense

The provisions of the 1974 Agreement on which plaintiffs rely are, and were at their inception, void and unenforceable because in violation of Section 8(e) of the Labor-Management Relations Act, 29 U.S.C. § 158(e) (1970).

Third Defense

The provisions of the 1974 Agreement on which plaintiffs rely are, and were at their inception, void and unenforceable because in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1970).

Fourth Defense

The Complaint fails to state a claim upon which relief can be granted.

Fifth Defense

The remedies plaintiffs seek are not proper remedies in a court of equity because they, and the provisions of the 1974 Agreement on which they are based, are contrary to public policy.

Sixth Defense

Paragraph 2 of the prayer for relief requests a form of relief that is not a proper remedy of a court of equity, and that Paragraph should be stricken from the Complaint.

Seventh Defense

Plaintiffs lack standing to bring this action.

Eighth Defense

The Complaint and this action do not comply with the requirements of Rule 19 of the Federal Rules of Civil Procedure because of the failure to join, as parties in the action, persons who have an interest relating to the subject of the action and are so situated that disposition of the action in their absence may (a) as a practical matter impair or impede their ability to protect that interest and (b) leave Kaiser Steel subject to a substantial risk of inconsistent obligations.

Ninth Defense

Plaintiffs' claims are barred at least in part by the non-occurrence of events which are conditions precedent to any duty of performance by Kaiser Steel.

Tenth Defense

Plaintiffs' claims are barred in whole or in part by the applicable statute of limitations.

Eleventh Defense

The Complaint and any claim for equitable relief purportedly stated therein are barred in whole or in part by unclean hands, by estoppel, and by laches.

Respectfully submitted,

ROBERT A. HAMMOND, III
A. DOUGLAS MELAMED
JOHN H. HARWOOD II
BRUCE E. COOLIDGE
WILMER, CUTLER &
PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Defendant
Kaiser Steel Corporation

Of Counsel:
RAYMOND A. HAILE,
Esquire
Vice President, General
Counsel & Secretary
Kaiser Steel Corporation
300 Lakeside Drive
Oakland, California 94666

June 2, 1978

III.

3. Plaintiffs' Motion for Summary Judgment

September 13, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0650

JULIUS MULLINS, *et al.*,
Plaintiffs,

v.

KAISER STEEL CORPORATION
Defendant.

MOTION OF PLAINTIFF TRUSTEES FOR SUMMARY JUDGMENT

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure and Rule 1-9(h) of the Rules of this Court, plaintiffs Julius Mullins, Kenneth L. Houck, and Paul R. Dean, Trustees of the United Mine Workers of America Health and Retirement Funds (hereinafter the "Trustees"), hereby move this Court for summary judgment that Kaiser Steel Corporation (hereinafter "Kaiser") is obligated to pay to the United Mine Workers of America Health and Retirement Funds (hereinafter the "Funds") the contributions due under the "purchase-of-coal" clause of Article XX(d) of the National Bituminous Coal Wage Agreement of 1974 (hereinafter the "1974 Agreement") and:

(1) Ordering Kaiser to file remittance advice reports covering coal procured or acquired for each month during the period covered by the 1974 Agreement;

(2) Ordering Kaiser to pay to the Funds the full amounts due in contributions pursuant to the "purchase-of-coal" clause of Article XX(d) of the 1974 Agreement, including interest on the amounts from the date they became due and owing, such amounts to be determined after further proceedings;

(3) Ordering Kaiser to present for inspection and/or copying all records pertaining to coal produced, pro-

cured or acquired and hours worked by defendant's employees, which are necessary to verify the amounts due and owing to the Funds pursuant to the 1974 Agreement, and to pay the costs of any audits conducted by plaintiff Trustees in connection with the verification of these amounts;

(4) Granting plaintiff Trustees attorneys' fees in the action pursuant to Section 502(g) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132; and

(5) Granting plaintiff Trustees costs in this action.

This motion is based on the material facts in the record, as supplemented by the affidavit filed this day by the plaintiff Trustees. These facts are set forth in the accompanying Statement of Material Facts as to Which There Is No Genuine Issue. The legal authorities supporting this motion are set out in the accompanying Memorandum of Plaintiff Trustees in Support of Motion for Summary Judgment.

Plaintiff Trustees hereby request oral argument on this motion for summary judgment.

Respectfully submitted,

/s/ Stephen J. Pollak
STEPHEN J. POLLAK
RALPH J. MOORE, JR.
WENDY S. WHITE
734 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 737-1255

Of Counsel:

SHEA & GARDNER
734 Fifteenth St., N.W.
Washington, D.C. 20005
(202) 737-1255

HENRY J. RUTH
WALTER O'CONNELL
2021 K Street, N.W.
Washington, D.C. 20006
(202) 452-5032

Dated September 13, 1978

III.

4. Plaintiffs' Statement of Uncontested Material Facts

September 13, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0650

JULIUS MULLINS, *et al.*,
Plaintiffs,
v.
KAISER STEEL CORPORATION,
Defendant.

PLAINTIFF TRUSTEES' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Rule 1-9(h) of the Rules of this Court, plaintiffs Julius Mullins, Kenneth L. Houck, and Paul R. Dean, Trustees of the United Mine Workers of America Health and Retirement Funds (hereinafter the "Trustees"), herewith submit the following statement of material facts as to which there is no genuine issue.

1. Plaintiffs Julius Mullins, Kenneth L. Houck and Paul R. Dean are Trustees of the United Mine Workers of America Health and Retirement Funds (hereinafter referred to as the "Funds").

[Danziger Affidavit [1] ¶ 2]

2. Defendant Kaiser Steel Corporation (hereinafter "Kaiser") is a company that engages in the mining, processing and purchasing of bituminous coal.

[Complaint and Answer ¶ 9; Danziger Affidavit ¶ 8]

---

[1] Reference is to the affidavit executed by Martin B. Danziger, Director of the Funds, on September 13, 1978, and filed contemporaneously herewith. The record of this case includes a second affidavit of Mr. Danziger executed June 27, 1978, and filed in connection with plaintiffs' opposition to defendant's motion to transfer the case. Wherever reference to this latter affidavit is intended, the citation will include the date of execution.

3. The International Union, United Mine Workers of America (hereinafter the "UMWA") is a labor organization which represents certain coal miners and other workers in the coal industry in collective bargaining and other labor-related activities.

[Danziger Affidavit ¶ 7]

4. The National Bituminous Coal Wage Agreement of 1974 (hereinafter the "1974 Agreement") is a collective bargaining agreement executed by the UMWA, various coal operators associations, and certain individual coal operators.

[Exhibit A to Complaint; Danziger Affidavit ¶ 4]

5. The largest association of coal operators to execute the 1974 Agreement was the Bituminous Coal Operators' Association (hereinafter "BCOA").

[Danziger Affidavit ¶ 6]

6. Kaiser was a member of BCOA and it became a party to the 1974 Agreement by virtue of its membership in BCOA.

[Danziger Affidavit of June 27, 1978 ¶ 5;
Danziger Affidavit ¶ 9]

7. The 1974 Agreement was executed on December 6, 1974, and continued in force and effect until December 6, 1977.

[Exhibit A to Complaint at 40; Danziger Affidavit ¶ 5]

8. Article XX of the 1974 Agreement provided for the establishment of four trusts, collectively referred to as the "Funds."

[Exhibit A to Complaint at 27; Danziger Affidavit ¶ 3]

9. Article XX(d) of the 1974 Agreement, which sets forth the method by which the four trusts are funded,

required employers who were signatories to that Agreement to contribute into each trust specified amounts for coal produced for use or for sale by the signatory employer. Article XX(d) also required signatory employers to contribute into each trust specified amounts for coal procured or acquired by such employer for use or for sale on which contributions to the trusts had not been made (hereinafter the "purchase-of-coal clause").

[Exhibit A to Complaint at 28]

10. Kaiser had approximately 400 UMWA employees who performed services for Kaiser during the term of the 1974 Agreement.

[Danziger Affidavit ¶ 10]

11. The Trustees provided forms (called "remittance advice forms") for use by signatory employers in reporting contributions to the Funds pursuant to the 1974 Agreement in respect to, *inter alia*, coal produced for use or sale and coal procured or acquired.

[Danziger Affidavit ¶ 11]

12. Between January 1975 and January 1978, Kaiser reported to the Funds on remittance advice forms provided by the Funds amounts of coal produced, hours worked in the production of such coal and contributions being made to the Funds relating to such production. Kaiser did not report that it had purchased, procured or acquired coal on which the contributions to the Funds called for by the 1974 Agreement had not been made in the space provided therefor on the remittance advice

forms which the Funds provided for use by signatory employers with respect to the period commencing December 6, 1974, and concluding December 6, 1977; and Kaiser did not report in the space provided on the remittance advice forms any contributions being made to the Funds with respect to any such coal purchased, procured or acquired.

[Danziger Affidavit ¶ 12]

13. During the terms of the 1974 Agreement and thereafter, Kaiser did not report to the Trustees or to the Funds in any manner that it had purchased, procured or acquired coal on which the contributions required by the 1974 Agreement had not been made and that it was not making contributions to the Funds with respect to such purchased coal.

[Danziger Affidavit ¶ 13]

14. During the term of the Agreement Kaiser purchased coal on which the contributions to the Funds required by Article XX(d) of the 1974 Agreement had not been made.

[Danziger Affidavit ¶ 14]

15. The Trustees have demanded payment from Kaiser of the contributions to the Funds called for by the purchase-of-coal clause of Article XX(d) of the 1974 Agreement on the coal purchased by Kaiser. Kaiser has not made such contributions to the Funds.

[Danziger Affidavit ¶ 15]

16. Neither Kaiser, nor any other signatory employer to the 1974 Agreement, filed an unfair labor charge with the National Labor Relations Board challenging the legality of the purchase-of-coal clause either during the term of the 1974 Agreement or thereafter.

[Danziger Affidavit ¶ 18]

17. Kaiser did not file any judicial action or intervene in any judicial action challenging the legality of the purchase-of-coal clause in the 1974 Agreement, during the term of that Agreement or thereafter, until it answered the complaint in this case.

[Danziger Affidavit ¶ 19]

18. The final paragraph of Article XX(d) provides that if during the term of the 1974 Agreement the purchase-of-coal clause is found to be unlawful, then, at the request of the union, a substitute clause would be negotiated in its place.

[Exhibit A to Complaint at 28]

/s/ Stephen J. Pollak
STEPHEN J. POLLAK
RALPH J. MOORE, JR.
WENDY S. WHITE
734 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 737-1255

HENRY S. RUTH, JR.
WALTER P. O'CONNELL
2021 K Street, N.W.
Washington, D.C. 20006
(202) 452-5032

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

Dated: September 13, 1978

III.

5. Notice of Appeal by Defendant

March 27, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0650

JULIUS MULLINS, *et al.*,
Plaintiffs,

v.

KAISER STEEL CORPORATION,
Defendant.

NOTICE OF APPEAL

Notice is hereby given that defendant Kaiser Steel Corporation appeals to the United States Court of Appeals for the District of Columbia Circuit from the order entered in this action on the 28th day of February, 1979, granting plaintiffs' motion for summary judgment, denying defendant's motion for summary judgment, directing sundry relief, and awarding attorneys' fees and costs.

/s/ Robert A. Hammond, III
ROBERT A. HAMMOND, III
A. DOUGLAS MELAMED
JOHN H. HARWOOD II
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Defendant
Kaiser Steel Corporation

Of Counsel:

RAYMOND A. HAILE, ESQ.
Vice President, General
Counsel & Secretary
300 Lakeside Drive
Oakland, California 94666

Dated: March 27, 1979

IV.

ORDER OF THE UNITED STATES SUPREME COURT GRANTING PETITION FOR CERTIORARI

Filed May 4, 1981

[Order of the Supreme Court filed May 4, 1981]

CERTIORARI GRANTED

• • • •

80-1345

KAISER STEEL CORP.

v.

MULLINS, JULIUS, *et al.*

The petition for writ of certiorari is granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

• • • •

V.

LETTER FROM CLERK OF THE UNITED STATES SUPREME COURT GRANTING EXTENSIONS OF TIME IN WHICH TO FILE BRIEFS

May 12, 1981

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES
Washington, D.C. 20543

May 12, 1981

A. Douglas Melamed, Esq.
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006

Stephen J. Pollak, Esq.
Shea & Gardner
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036

RE: *Kaiser Steel Corporation* v. *Julius Mullins, et al.*, No. 80-1345

Gentlemen:

Your joint request of May 11, 1981 has been granted.

The time for filing petitioner's brief on the merits has been extended to and including July 8, 1981.

The time for filing respondents' brief on the merits has been extended to and including August 31, 1981.

Very truly yours,

ALEXANDER L. STEVAS
Clerk

By /s/ June M. Hoffmann
(Miss) JUNE M. HOFFMANN
Assistant Clerk

Office-Supreme Court, U.S.
FILED
APR 13 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

STEPHEN J. POLLAK*
RALPH J. MOORE, JR.
WENDY S. WHITE
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

E. CALVIN GOLUMBIC
WALTER P. O'CONNELL
United Mine Workers of America Health and Retirement Funds
2021 K Street, N.W.
Washington, D.C. 20006
(202) 452-5000

Counsel for Respondents Julius Mullins et al.

* Counsel of Record

Of Counsel:
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036

April 13, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied *Kelly* v. *Kosuga*, 385 U.S. 516 (1959), in declining to entertain an antitrust defense raised by an employer in a suit by the trustees of an employee health and retirement fund seeking contributions owed to the fund by the employer.

2. Whether, in a suit brought by trustees seeking contributions to an employee health and retirement fund, the Court of Appeals properly declined, on the ground that unfair labor practice claims fall within the exclusive jurisdiction of the NLRB, to entertain the defense that the agreement requiring payment of those contributions violates Section 8(e) of the National Labor Relations Act.

3. Whether the Court of Appeals properly held that the trustees of an employee health and retirement fund were entitled to reasonable attorneys' fees where the trustees had recovered delinquent contributions due the fund from an employer-contributor in a suit pursuant to ERISA.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
A. Kaiser's Obligations Under the 1974 Agreement	2
B. The Opinion Below	4
ARGUMENT	7
I. INTRODUCTION AND SUMMARY	7
II. REJECTION OF KAISER'S ANTITRUST DEFENSE WAS A PROPER APPLICATION OF *KELLY* v. *KOSUGA* AND RAISES NO ISSUE WARRANTING REVIEW	7
III. THE HOLDING BELOW THAT KAISER'S UNFAIR LABOR PRACTICE DEFENSE IS WITHIN THE NLRB'S EXCLUSIVE JURISDICTION IS CORRECT AND PRESENTS NO ISSUE WARRANTING REVIEW	11
A. The Court of Appeals Properly Rejected Kaiser's Section 8(e) Defense	11
1. Kaiser's 8(e) Claim Falls Within the Exclusive Jurisdiction of the NLRB	11
2. The Board's Jurisdiction Could Not Be Circumvented by Raising the Claim as a Defense to a Contract Action	11
3. The Court of Appeals' Decision Is Consistent with Prior Decisions of this Court	13

TABLE OF CONTENTS—Continued

Page

B. The Court of Appeals' Construction of Section 8(e) Is Consistent with Labor Policy and the Constitution 16

C. There Is No Conflict Among the Circuits Meriting Review by this Court 20

IV. THE AWARD OF ATTORNEYS' FEES WAS AUTHORIZED BY ERISA AND DOES NOT MERIT REVIEW 24

CONCLUSION 27

TABLE OF AUTHORITIES

Cases: Page

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970).. 20
Amalgamated Workers v. *Consolidated Edison Co.*, 309 U.S. 261 (1940) 16, 17, 18, 19
Atchison, Topeka & Santa Fe Ry. v. *Locals 70, 85, and 315 of the International Brotherhood of Teamsters*, 511 F.2d 1193 (9th Cir. 1975) 15, 24
Bradley v. *Richmond School Board*, 416 U.S. 696 (1974) 26
Bugher v. *Southland Fabricators & Erectors, Inc.*, 452 F. Supp. 870 (W.D. La. 1978) 25
Bugher v. *Frash*, 98 LRRM 3010 (S.D. Ind. 1977) 25
California v. *Taylor*, 353 U.S. 553 (1957) 20
Carrier Air Conditioning Co. v. *NLRB*, 547 F.2d 1178 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977) 22
Connell Construction Co. v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975) 13, 14, 16
Federal Trade Commission v. *Klesner*, 280 U.S. 19 (1929) 19
Huge v. *Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979)..6, 20, 21
Huge v. *Maximeadows Mining Co.*, 459 F. Supp. 267 (N.D. Ala. 1978) 25
Huge v. *Overly*, 445 F. Supp. 946 (W.D. Pa. 1978) 25
Huge v. *Reid*, 468 F. Supp. 1024 (N.D. Ala. 1979), *aff'd mem.*, 615 F.2d 916 (5th Cir. 1980) 25
IAM National Pension Fund v. *Ward La France Truck Corp.*, C.A. 77-1206 (D.D.C. Feb. 1, 1978) 25
Kelly v. *Kosuga*, 358 U.S. 516 (1959) .....*passim*
Lewis v. *Seanor Coal Co.*, 256 F. Supp. 456 (W.D. Pa. 1966), *aff'd*, 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968) 20, 21
Local Lodge No. 1898 of District No. 38 of the IAM v. *Brake and Electric Sales Corp.*, 279 F.2d 590 (1st Cir. 1960) 21, 22

TABLE OF AUTHORITIES—Continued

	Page
McMullen v. *Hoffman*, 174 U.S. 639 (1899)	8
Miree v. *Dekalb County*, 433 U.S. 25 (1977)	20
Motor Coach Employees v. *Lockridge*, 403 U.S. 274 (1971)	13, 14, 16
Mullins v. *Reitz Coal Co.*, C.A. No. 78-0715 (D.D.C. Mar. 23, 1979)	25
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938)	16, 19
National Licorice Co. v. *NLRB*, 309 U.S. 350 (1940)	16
National Woodwork Manufacturers Ass'n v. *NLRB*, 386 U.S. 612 (1967)	12
NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975)	18
Orange Belt District Council of Painters No. 48 v. *Maloney Specialties, Inc.*, 106 LRRM 2183 (9th Cir. 1980)	21
San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 (1959)	11
Sheet Metal Workers Pension Fund v. *Young's Roofing Inc.*, C.A. No. 77-1849 (D.D.C. May 3, 1978)	25
Smith v. *Evening News Ass'n*, 371 U.S. 195 (1962)	*passim*
Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 (1979)	9
Todd Shipyards Corp. v. *Industrial Union of Marine and Shipbuilding Workers of America, Local 39*, 344 F.2d 107 (2d Cir. 1965)	22, 23
United Optical Workers Union Local 408 v. *Sterling Optical Co.*, 500 F.2d 220 (2d Cir. 1974)	22, 23
United States Steel Corp. v. *International Union, UMWA*, C.A. No. 75-1966 (D.D.C. 1977)	4, 5
Vaca v. *Sipes*, 386 U.S. 171 (1967)	18
Waggoner v. *R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979)	6, 20, 21

TABLE OF AUTHORITIES—Continued

Statutes: Page

Employee Retirement Income Security Act of 1974, as amended:

§ 502(a)(3), 29 U.S.C. § 1132(a)(3) 6, 24, 25
§ 502(g), 29 U.S.C. § 1132(g) 6, 25

Labor Management Relations Act, as amended:

§ 301, 29 U.S.C. § 185 ..... 14, 15, 23, 24
§ 303, 29 U.S.C. § 187 12

Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (Sept. 26, 1980) 7, 25, 26

§ 306, 94 Stat. 1295 25

National Labor Relations Act, as amended:

§ 3(d), 29 U.S.C. § 153(d) 18
§ 8(b)(4), 29 U.S.C. § 158(b)(4) 12
§ 8(e), 29 U.S.C. § 158(e) ..... *passim*
§ 10, 29 U.S.C. § 160 11

Sherman Act, 15 U.S.C. §§ 1, 2 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1345

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

In this case petitioner Kaiser Steel Corporation ("Kaiser") seeks review of the decision of the U.S. Court of Appeals for the District of Columbia Circuit affirming the District Court's granting of summary judgment in favor of the Trustees of the United Mine Workers of America Health and Retirement Funds ("Trustees"). App. 81a-82a.[1] The action was brought by the Trustees to recover health and retirement fund contributions from Kaiser, a signatory employer to the National Bituminous Coal Wage Agreement of 1974

[1] References to the Appendix filed with Kaiser's petition ("Pet.") will be cited as "App. ——"; references to the Joint Appendix filed in the Court of Appeals will be cited as "C.A.J.A. ——."

("1974 Agreement"). Kaiser conceded that the contributions were due according to the terms of its contract, Pet. 2-3, but it resisted payment on the ground that the contract it entered into and never challenged during its term was unlawful. Pet. 3-5. Both Courts below rejected Kaiser's belated attempt to challenge the legality of the contract and ordered payment of the full amount of disputed contributions and attorneys' fees.

A. Kaiser's Obligations Under the 1974 Agreement.

The relevant facts can be simply stated. The 1974 Agreement was a three-year collective bargaining agreement between the International Union, United Mine Workers of America ("UMWA") and various coal operators and associations of coal operators, including the Bituminous Coal Operators Association ("BCOA"). C.A.J.A. 179. Kaiser, as a member of BCOA, became a signatory to the 1974 Agreement. C.A.J.A. 180.

Among other provisions, the 1974 Agreement provided for the establishment and funding of four trusts (collectively referred to as the "Funds") to provide health and retirement benefits for coal miners and their families. Article XX(d) of the Agreement sets forth the methods of measuring the contributions owed by each signatory employer. C.A.J.A. 44-45. Thus, it provided for payments to the various trusts for all coal handled by the employer for use or for sale, whether the coal was produced by the employer or procured or acquired from another company which had not made the required contribution to the Funds. *Id.* The contribution to be paid for produced coal was approximately equivalent to that due on purchased coal under what was known as the "purchase-of-coal clause." C.A.J.A. 181.[2]

---

[2] Previous collective bargaining agreements between the UMWA and the employers also contained a clause providing for the payment of contributions on purchased coal. The prior clause, how-

Article XX(d) further provided that it was the responsibility of each signatory employer to report accurately to the Funds, on a monthly basis, the amount of coal produced by the company, the number of hours worked by company employees in producing the coal, and the amount of coal purchased by the company. C.A.J.A. 45. These reports were to be submitted to the Trustees on "remittance advice forms" provided to employers by the Funds. C.A.J.A. 180.

Throughout the term of the 1974 Agreement Kaiser, in compliance with Article XX(d) of the Agreement, reported the amount of coal produced and the number of hours worked by its employees, and paid the appropriate contributions thereon. C.A.J.A. 180. Kaiser failed, however, to report that it was purchasing coal, and failed to pay the required contributions under the purchase-of-coal clause. C.A.J.A. 180-81. Moreover, Kaiser failed to alert the Trustees that it had determined to ignore its purchase-of-coal obligations during the term of the Agreement. C.A.J.A. 181.

Prior to the expiration of the 1974 Agreement, the Trustees received a report of Kaiser's purchases and mounted an investigation. C.A.J.A. 181-82.[3] The Trus-

---

ever, required employers to pay twice the amount of the produced coal contribution. This excess charge was sometimes referred to as a "penalty." By fixing the contributions in a way so as to require substantially equal contributions for produced and purchased coal, the parties to the 1974 Agreement eliminated "[w]hatever penalty may have been implicit in the disparity of payments in the earlier clause * * *." App. 4a.

[3] The issue as to when the Trustees learned of Kaiser's purchases is, contrary to the suggestion in Kaiser's petition, a matter of some dispute. The Trustees contend that they did not know anything of Kaiser's purchases until they received a report from a union member in June 1976. C.A.J.A. 181. Kaiser contends that the Trustees knew long before the commencement of the 1974 Agreement and nevertheless chose not to enforce the clause. Pet. at 4. The Court of Appeals assumed, quite properly, that for

tees then demanded payment; when Kaiser refused to pay, this suit was filed. *Id.* Kaiser defended on the ground that the clause was unlawful and hence unenforceable. Specifically, Kaiser asserted that the clause violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 8(e) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(e). C.A.J.A. 73.

This was the first time that Kaiser sought to challenge the legality of the purchase-of-coal clause. One signatory company, however, had endeavored to have the purchase-of-coal clause of the 1974 Agreement declared unlawful during the term of the Agreement. In 1977, U.S. Steel Corporation brought an action against the UMWA and the Trustees for a declaratory judgment that the "purchase-of-coal" clause violated Section 8(e) of the NLRA and Sections 1 and 2 of the Sherman Act. *U.S. Steel Corp.* v. *International Union, UMWA*, C.A. No. 75-1966 (D.D.C.). The Trustees counterclaimed for the unpaid contributions. There the District Court, without reaching the Section 8(e) issue, determined that the clause did not violate the antitrust laws. *U.S. Steel, supra*, unpublished order of Oct. 5, 1977. The lawsuit was subsequently settled when U.S. Steel paid the full amount of the contributions owed. Kaiser did not join this suit, bring its own suit, or pay its contributions as a result of the outcome there. C.A.J.A. 182.

B. The Opinion Below.

The question thus facing the District Court and then the Court of Appeals was whether "Kaiser's proffered defense of illegality should be entertained." App. 9a. At the outset, the Court noted that "[t]his is not a case

---

purposes of summary judgment, Kaiser's version of the facts was to be taken as correct. App. 6a, n. 3. As the Court further noted, however, the relevance of the issue on the legal questions involved is "marginal." *Id.*

in which a contract's illegality is manifest." Moreover, "[t]here is, in fact, good reason to think that the purchase-of-coal clause is consistent with both federal antitrust and federal labor law." App. 7a, n.5. In so stating, the court cited *U.S. Steel Corp.* v. *International Union, UMWA, supra*, and several other cases which support the Trustees' position that, if the Court were to reach the merits, it would find the clause to be lawful. App. 7a-8a.

In any event, the Court concluded that neither the antitrust defense nor the Section 8(e) defense was available to Kaiser here. In rejecting the antitrust defense, the Court relied upon this Court's holding in *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), that, where a contract had been fully performed by one party, the other party cannot avoid its part of the bargain by claiming that the agreement is violative of the antitrust laws. In addition, in examining Kaiser's claim further, the Court determined that it was "Kaiser's choice to adopt a strategy of ignoring its contractual obligations to the Trustees and of not pursuing its opportunities for a timely and direct adjudication of its rights." App. 18a. Accordingly, the Court concluded that Kaiser was barred from raising its antitrust claim as a defense to the Trustees' suit for contributions. App. 10a-19a.

Similarly, the Court held that Kaiser's assertion that the purchase-of-coal clause is an unfair labor practice proscribed by Section 8(e) could not serve as a defense to the Trustees' suit. Congress, the Court found, explicitly set forth the available remedies for labor disputes "and apportioned those remedies to distinct tribunals, each with its own special competence." App. 20a. With respect to unfair labor practice claims, Congress determined that the proper forum is not the courts but the National Labor Relations Board. Section 8(e), which "opens with the language that '[i]t shall be an unfair

labor practice' is no exception." *Id.* Thus, the Court concluded that Kaiser was required to present its claim that it "had been victimized by the UMW" to the Labor Board. App. 28a. Having failed to do so, Kaiser could not avoid Congress' clear statutory scheme by attempting to have the District Court decide its unfair labor practice claim against the union in the guise of a defense to a contract action brought by the Trustees. App. 30a.

In rejecting Kaiser's illegality defenses, the Court of Appeals noted that it was "join[ing] two other courts of appeals on this question." App. 9a. The Third Circuit, in *Huge* v. *Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979), rejected both the antitrust and the Section 8(e) defenses in another suit brought by the Trustees of the Funds to compel payment of contributions owed under the 1974 Agreement. The Ninth Circuit, in *Waggoner* v. *R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979), held that an employer could not raise a Section 8(e) defense in a suit brought by trustees of a benefit fund for contributions due to the fund under a collective bargaining agreement.

Having determined that the Trustees were entitled to the contributions sought in the litigation, the Court then affirmed the District Court's award of attorneys' fees pursuant to Section 502(g) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(g). This provision, the Court held, specifically authorizes such awards in suits brought, as this one was, under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). App. 33a-34a.

ARGUMENT

I. INTRODUCTION AND SUMMARY

This case presents two similar issues—neither of which constitutes a novel question for this Court to review.[4] Here, an employer, Kaiser, resists payment of contributions due its employee health and retirement fund on two grounds: (1) that its agreement to pay the contributions violates the antitrust laws, and (2) that the agreement constitutes an unfair labor practice proscribed by the National Labor Relations Act. The Court of Appeals determined that Kaiser was raising its antitrust claim at the wrong time and in the wrong context, and its labor claim against the wrong party and in the wrong forum.

The crux of this case, as the Court of Appeals recognized, is that, contrary to Kaiser's urgings, courts are not authorized to create new remedies for claims either under the antitrust laws or the labor laws—remedies not provided for in the statutes. Thus, in rejecting Kaiser's defenses, the Court of Appeals was doing no more than applying prior decisions of this Court and settled principles of the antitrust and labor laws. For these reasons, neither issue is worthy of review by this Court.

II. REJECTION OF KAISER'S ANTITRUST DEFENSE WAS A PROPER APPLICATION OF *KELLY* v. *KOSUGA* AND RAISES NO ISSUE WARRANTING REVIEW.

Kaiser's initial contention in its petition is that "[i]t has always been the law, until this case, that courts do not enforce illegal contracts * * *." Pet. 6. Kaiser is

---

[4] Kaiser also raises an attorneys' fees question that has recently been disposed of by Congress in the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980). See *infra*, pp. 25-26.

correct that the question whether or not a court should enforce a contract that may prove to be unlawful is not a new issue to face this Court. Contrary to Kaiser's assertion, however, the Court has not adopted a uniform rule of non-enforcement. Indeed, the question whether to entertain an illegality defense in a contract action, this Court has concluded, depends upon the circumstances of the particular case.[5]

Thus, where this Court was faced with a contract plainly contrary to public policy, and where refusal to enforce the agreement was necessary "in order to better secure the public against dishonest transactions," this Court has declined to enforce the bargain in a suit brought by one of the persons who was a party to the unlawful scheme. *McMullen* v. *Hoffman*, 174 U.S. 639 (1899). See discussion by the Court of Appeals at App. 13a, n. 7.

On the other hand, where two parties have entered into a contract for the purchase and sale of certain goods and one party has delivered the goods, this Court has refused to excuse the buyer from performing his part of the bargain on the ground that the contract violated the antitrust laws. This is the holding of *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), where this Court rejected a buyer's antitrust defense in a suit brought by a seller to recover the purchase price of goods sold and delivered. The Court stated:

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. This has been notably the case where the plea has

---

[5] As explained by the Court of Appeals here, there is a "hoary maxim that courts will not enforce an illegal bargain," App. 15a, but this rule, "like many other maxims, [is] only incompletely true. The rule actually employed by the court is both more complex and more sensitive to nuances of legal relationships." *Id.*

been made by a purchaser in an action to recover from him the agreed price of goods sold." *Id.* at 518 (footnote omitted).

The Court recognized in *Kelly* that there could be cases where a judgment giving effect to the contract would itself result in the enforcement of "the precise conduct made unlawful by the [Sherman Act]." *Id.* at 520. Under those circumstances, the Court indicated that the antitrust defense would be entertained. The general rule of *Kelly*, however, is that where a contract has been performed by one side, the non-performing party should not be able to avoid his obligations by arguing that the contract was entered into in violation of the antitrust laws.

The rationale of *Kelly*, as expressed by this Court, is two-fold. First, this Court was concerned that people not be able to get "other people's property for nothing when they purport to be buying it." *Id.* at 520-21. The Court's second reason was more limited. The Court recognized that, in rejecting the antitrust defense, it was not leaving the party raising the defense without a means of remedying the allegedly unlawful act. On the contrary, the Sherman Act provides a fully adequate remedy for antitrust violations—treble damages. Consequently, in rejecting the antitrust defense in the contract action, this Court was only refusing to add nonenforcement as an additional remedy to those already explicitly provided by the Sherman Act. *Id.* at 519.[6]

As the Court of Appeals held below, both the language and rationale of *Kelly* apply to the facts of the instant case:

---

[6] This latter message of *Kelly*—that courts should not create new remedies where Congress has provided explicit remedies by statute—is one that this Court has recently reemphasized. Last term in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979), this Court, rejecting the creation of a private right

> "The affirmative defense of antitrust illegality does not lie against a contract that is 'an intelligible economic transaction in itself.' *Kelly*, 358 U.S. at 521. The purchase-of-coal clause, as part of the overall compensation for those covered by the 1974 Agreement, meets this test. The contract has been fully preformed by the members of the bargaining unit; they are entitled to the full measure of their bargained-for consideration. [Citations omitted.]" App. 13a-14a.[7]

Moreover, as the Court of Appeals recognized, "[i]f Kaiser truly believed the purchase-of-coal clause would not withstand judicial scrutiny, it did not have to wait for others to act." App. 18a. The antitrust laws afforded Kaiser a fully adequate remedy. It could have filed a declaratory judgment action against the UMWA to have the purchase-of-coal clause declared unlawful. It chose not to do so. Having made that choice, the courts should not create a new statutory remedy for Kaiser. *Kelly*, *supra*, 358 U.S. at 519.

In short, the decision of the Court of Appeals does not, as Kaiser suggests, "writ[e] the defense of illegality out of the law." Pet. 11. Rather, the decision does no

---

of action under Section 206 of the Investment Advisers Act of 1940, once again made clear that "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."

[7] Kaiser mischaracterizes *Kelly* when it seeks to distinguish this Court's decision there by arguing that *Kelly* involved the enforcement of a "*lawful* contract [clause] alleged by the defendants to be unenforceable because of 'collateral' illegalities of *other* parts of the parties' [agreement]." Pet. 12, n. 16. On the contrary, this Court rejected an "analysis in terms of 'divisibility'" and treated the whole contract as "an intelligible economic transaction." *Kelly*, *supra*, 358 U.S. at 521. Accordingly, it enforced the purchase agreement, explaining that "it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price." *Id.*

more than to follow the dictates of *Kelly*—in rejecting the presentation of a Sherman Act defense in a contract action where one side has fully performed its part of the bargain. Accordingly, there is no reason for review by this Court.

III. THE HOLDING BELOW THAT KAISER'S UNFAIR LABOR PRACTICE DEFENSE IS WITHIN THE NLRB'S EXCLUSIVE JURISDICTION IS CORRECT AND PRESENTS NO ISSUE WARRANTING REVIEW.

In addition to its antitrust defense, Kaiser sought to interpose in this litigation the defense that the purchase-of-coal clause violates Section 8(e) of the National Labor Relations Act. The Court of Appeals properly refused to entertain this defense and that holding presents no issue warranting review by this Court.

A. The Court of Appeals Properly Rejected Kaiser's Section 8(e) Defense.

1. *Kaiser's 8(e) Claim Falls Within the Exclusive Jurisdiction of the NLRB.* Section 8(e) of the National Labor Relations Act provides that "[i]t shall be an unfair labor practice" for a union and an employer to enter into a "hot cargo" agreement, that is, an agreement that prohibits a neutral employer from doing business with another employer with whom the union has a direct dispute. As with other unfair labor practices, the mechanism for enforcement is through the National Labor Relations Board, pursuant to Section 10 of the NLRA, 29 U.S.C. § 160. It is well-settled that this enforcement mechanism, expressly established by statute, provides the exclusive remedy for unfair labor practice claims. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

2. *The Board's Jurisdiction Could Not Be Circumvented by Raising the Claim as a Defense to a Contract*

Action. Kaiser determined not to present to the Board its claim against the *UMWA* that the purchase-of-coal clause violates Section 8(e). Instead, it sought to avoid the Board's exclusive jurisdiction by raising its claim as a defense when *the Trustees* brought this contract action. The Court of Appeals, looking to the language, structure and policy of Section 8(e) and the NLRA, ruled that Kaiser's effort to circumvent the NLRB must fail. The Court found that "Congress added Section 8(e) to the labor law as part of a wider effort to strengthen and clarify the law's existing prohibitions against 'secondary boycotts' by labor organizations." App. 20a. Prior to the enactment of Section 8(e), the statute provided that it was an unfair labor practice for a union to strike to enforce a "hot cargo" agreement, Section 8(b)(4), 29 U.S.C. § 158(b)(4), but not that it was unlawful to enter into such a contract. Section 8(e) was adopted to close that "loophole." *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 634 (1967).

While Sections 8(e) and 8(b)(4) were both passed by Congress to address the problem of secondary boycotts, the remedies expressly provided by Congress are not the same. Congress determined to single out unfair labor practice charges under Section 8(b)(4), the provision prohibiting strikes to enforce a hot cargo clause, by providing in Section 303 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 187, that Section 8(b)(4), unlike other unfair labor practices, is enforceable in the federal courts. In enacting Section 8(e), on the other hand, it did not give the federal courts jurisdiction. As the Court of Appeals explained, "Congress well knew the disruptive potential of judicially created remedies for labor disputes" and "[a]ccordingly, Congress carefully defined the remedies that might be sought for violations of section 8(e) * * *." App. 20a. The

remedy Congress defined for alleged Section 8(e) violations is the filing of a charge with the NLRB.

Having examined the statutory scheme and found that Congress did not create a judicial remedy for the enforcement of Section 8(e), but rather included it among the unfair labor practices to be enforced by the Board, the Court of Appeals held: "When Congress has spoken so directly on the remedies to be provided for statutory violations, it is not for the courts to add remedies of their own." App. 21a. Thus, the Court refused to hear Kaiser's section 8(e) defense, holding that "[t]o permit an employer to assert a Section 8(e) defense in a suit like this would add the remedy of contract avoidance to the other forms of relief which the statute expressly provides." App. 22a.[8]

3. *The Court of Appeals Decision Is Consistent with Prior Decisions of this Court.* As the Court of Appeals concluded, this decision is fully consistent with the prior decisions of this Court cited in Kaiser's petition, *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962), and *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971). Pet. 18-20.

Connell was a lawsuit filed by an employer against a union seeking a determination that an agreement that it had signed under duress violated the Sherman Act. The union defended on the ground that its conduct was

---

[8] The language in Section 8(e) providing that a "hot cargo" agreement would be unenforceable and void, the Court held, did not require a contrary result. The Court pointed out "the existence of such a statutory declaration does not imply that contracts of a certain sort can never be enforced under any circumstances." Here, after closely reviewing the legislative history, the Court determined that the "unenforceable and void" language was designed to prevent a union from obtaining "specific performance" of a "hot cargo" clause. It did not create a separate judicial remedy for employers. App. 22a-23a.

protected from the antitrust laws by the "construction industry proviso" to Section 8(e), which specifically authorized the sort of agreement at issue. In order to decide whether the agreement fell within the proviso, this Court ruled that "federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws." 421 U.S. at 626. Kaiser argues that this language gives the federal courts jurisdiction over its Section 8(e) defense.

Kaiser's argument, however, fails to recognize that the "collateral" labor issue to be resolved in *Connell* was quite different from the "collateral" issue here. In *Connell*, the union was not claiming that an unfair labor practice had been committed. On the contrary, the union was asserting that its conduct was protected by the construction industry proviso of Section 8(e). The question raised by the union could not have been addressed by the Labor Board because it does not have jurisdiction to decide the scope of Section 8(e) absent a charge that an unfair labor practice has occurred. As a consequence, there was no mechanism for the administrative adjudication of the "collateral labor law issue" which the Court undertook to resolve. Accordingly, since Kaiser, unlike Connell, had an administrative remedy available to it, the Court of Appeals concluded that assertion of jurisdiction by the federal courts was unwarranted. App. 28a.

Similarly, assertion of jurisdiction over Kaiser's 8(e) defense was not warranted by *Smith* v. *Evening News Ass'n*, *supra*, or *Motor Coach Employees* v. *Lockridge*, *supra*. In these cases, suit was brought under Section 301 of the LMRA[9] for breach of a collective bargaining agreement. The defendants in both cases argued in de-

[9] Section 301 of the LMRA, 29 U.S.C. § 185, gives the federal courts jurisdiction over suits for violation of contracts between an employer and a labor organization.

fense to the contract actions that the courts did not have jurisdiction to hear the suits because the breach of contract alleged also constituted an unfair labor practice under the NLRA, and that, therefore, the matters had to be referred to the NLRB.

The Court, however, rejected that defense on the ground that the federal courts are not precluded from deciding contract claims at issue under Section 301 simply because the breach might *also* be an unfair labor practice. As this Court held in *Smith* v. *Evening News Ass'n*: "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301." 371 U.S. at 197.

These Section 301 cases, as the Court of Appeals found, are quite different from the dispute at bar. App. 25a-26a. There, the courts were not asked to determine whether certain conduct constituted an unfair labor practice, *i.e.*, a violation of Section 8 of the NLRA. Rather, the courts were asked to decide only whether a contract had been breached—and that, of course, is a matter the federal courts had unquestioned jurisdiction to decide. Here, on the other hand, Kaiser is asking specifically for a determination that the purchase-of-coal clause violated Section 8(e). Unlike these Section 301 cases where the legality of the contract clause was not questioned and only its breach was at issue, it is the clause itself that is being attacked as an unfair labor practice.[10]

In sum, the Court of Appeals ruling that Kaiser's Section 8(e) defense falls within the exclusive jurisdiction of the NLRB is correct; it is consistent with this

[10] The Court of Appeals decision in this respect is consistent with the analysis set forth by the Ninth Circuit in *Atchison, Topeka & Santa Fe Ry.* v. *Locals 70, 85, and 315 of the International Brotherhood of Teamsters*, 511 F.2d 1193 (9th Cir. 1975).

Court's decision in *Connell* and with the Section 301 cases *Smith* and *Motor Coach Employees*; and it raises no issue for review by this Court.

B. The Court of Appeals' Construction of Section 8(e) Is Consistent with Labor Policy and the Constitution.

Kaiser contends that the Court of Appeals' ruling, which precluded presentation of its unfair labor practice defense to the court in the first instance, raises "grave constitutional problems." Pet. 21. Kaiser emphasizes that under the enforcement scheme of the NLRA, an unfair labor practice charge may never reach the courts because the General Counsel of the NLRB has unreviewable discretion to decline to issue a complaint. *Id.* Thus, Kaiser concludes, courts may have to adjudicate parties' rights under arguably unlawful agreements while not being able to determine the legality of the contract provisions at issue. This restraint upon the courts, Kaiser asserts, is unconstitutional. Pet. 22.

Kaiser's constitutional concerns, however, are based upon a misunderstanding of the statutory scheme of the NLRA. Kaiser's argument assumes that the NLRA created private rights respecting the enforcement of unfair labor practice charges. But as this Court has long held, "'[n]o private right of action is contemplated [by the NLRA]. Essentially the unfair labor practices listed [in Section 8] are matters of public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint.'" *Amalgamated Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 267 (1940), quoting H.R. Rep. No. 972, 74th Cong., 1st Sess. 21. *See also National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940). The constitutionality of this exclusive jurisdiction procedure was specifically upheld by this Court in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938).

The theory and structure of the NLRA enforcement scheme was explored by this Court in *Amalgamated Workers*. The NLRA was enacted by Congress "in the interest of interstate commerce" to safeguard the right of employees to take "united action" and to "seek to make appropriate collective action 'an instrument of peace rather than of strife.'" 309 U.S. at 264. The enforcement mechanism, this Court then explained, was tailored to the purpose of the Act:

> "To attain its object Congress created a particular agency, the National Labor Relations Board, and established a special procedure. * * * Within the range of its constitutional power, Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective." *Id.*

The remedy that Congress determined to provide was placed in the hands of the National Labor Relations Board. Further, as the Court explained, the Board was to be not only the forum for the presentation of unfair labor practice charges, but also the sole determinant of whether an unfair labor practice had occurred:

> "Congress declared that certain labor practices should be unfair, but it prescribed a particular method by which such practices should be ascertained and prevented. By the express terms of the Act, the Board was made the exclusive agency for that purpose." *Id.*

After examining the text of the statute, this Court determined:

> "The Act then sets forth a definite and restricted procedure. A charge of an unfair labor practice may be presented to the Board, but the person or group making the charges does not become the actor in the proceeding. It is the Board, and the Board

> alone or its designated agent, which has power to issue its complaint against the person charged with the unfair labor practice." *Id.* at 264-65.

Thus, the Court concluded:

> "[I]t is apparent that Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief. *The Board as a public agency acting in the public interest, not any private person or group, * * * is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.*" *Id.* at 265 (emphasis added).

In short, the NLRA provides that it is for "the Board alone or its designated agent" to determine whether to pursue an unfair labor practice charge. Moreover, Section 3(d) of the Act specifically delegates to the General Counsel "final authority, on behalf of the Board" to investigate and issue unfair labor practice complaints. 29 U.S.C. § 153(d). As noted on at least two occasions by this Court, the General Counsel's decision not to issue a complaint is unreviewable. *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138-39 (1975). The reason for this rule is essentially the same as the reason underlying the entire statutory scheme, that is, that the Act is not designed to provide for individual relief but to protect broader public rights. As this Court explained in *Sears, Roebuck & Co.*:

> "* * * Congress has delegated to the Office of General Counsel 'on behalf of the Board' the unreviewable authority to determine whether a complaint shall be filed * * *. In those cases in which he decides that a complaint shall issue, the General Counsel becomes an advocate before the Board in support of the complaint. In those cases in which he decides

> not to issue a complaint, no proceeding before the Board occurs at all. The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration." 421 U.S. at 138-39.[11]

Kaiser has sought to avoid this statutory scheme, which does not afford employers private enforcement rights, by ignoring it. Then, belatedly, Kaiser argues that the Court of Appeals' decision leaves "employers like Kaiser Steel with the prospect that they may be compelled to comply with a contract clause the lawfulness of which *no court* has been able to review." Pet. 21. It was not, however, the Court of Appeals that left Kaiser without a forum. Rather it was the terms of the statute, the constitutionality of which was long ago upheld, *Myers* v. *Bethlehem Shipbuilding Corp.*, *supra*, and it was Kaiser's own decision to refrain from pursuing the remedy that Congress did provide. Kaiser's "grave constitutional problems" are, accordingly, unwarranted.

In any event, Kaiser's constitutional concerns should not be entertained at this stage of the proceeding. Kaiser is presenting its constitutional argument to this Court for the first time. Although it was open to Kaiser in

---

[11] Chief Justice Hughes recognized that this scheme of enforcement is not unique to the labor laws. *Amalgamated Workers* v. *Consolidated Edison Co.*, *supra*, 309 U.S. at 268. A similar rule applies, for example, in connection with Section 5 of the Federal Trade Commission Act. Under Section 5, "[a] person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may of course bring the matter to the Commission's attention and request it to file a complaint. But a denial of his request is final." *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 25 (1929).

the District Court and in the Court of Appeals to challenge the Trustees' interpretation of the NLRA on the ground that it would render the statute unconstitutional, it did not do so. It is well-settled that this Court will not consider issues neither raised before nor considered by the District Court or the Court of Appeals. *Miree* v. *Dekalb County*, 433 U.S. 25, 33-34 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970); *California* v. *Taylor*, 353 U.S. 553, 557 n. 2 (1957).

C. There Is No Conflict Among the Circuits Meriting Review by this Court.

The question presented in this case—whether employers can defend a suit for contributions by the trustees of an employee health and retirement fund on the ground that the contribution provision in the collective bargaining agreement is unlawful under Section 8(e) of the NLRA—has been decided in three Circuits. In addition to the decision below, the other two Circuits have held that the employer's unfair labor practice claim was not a proper defense before the district court. *Huge* v. *Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979); *Waggoner* v. *R. McGray Inc.*, 607 F.2d 1229 (9th Cir. 1979).

The question was first raised in *Huge* v. *Long's Hauling Co.*, *supra*. There the Third Circuit rejected the employer's 8(e) defense in a suit brought by the Trustees of the UMWA Health and Retirement Funds squarely on the ground that "[u]nder *Garmon* [the] allegations of unfair labor practices and violations of section 8(e) were not proper defenses before the district court." 590 F.2d at 461.[12]

[12] Kaiser suggests that a contrary result had been reached by the Third Circuit in *Lewis* v. *Seanor Coal Co.*, 382 F.2d 437 (1967), *cert. denied*, 390 U.S. 947 (1968). Pet. 24. The Third Circuit, however, never reached the question. The District Court in *Seanor*, on the other hand, reached the same conclusion the Third Circuit

The other Court of Appeals that has addressed the issue is the Ninth Circuit. In *Waggoner* v. *R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979), the Court similarly rejected the employer's 8(e) defense in a suit for contributions brought by trustees of a pension fund. The Court ruled:

> "As the Supreme Court explained in *Garmon*, 'the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience.' [Citations omitted.] *Respect for this congressional determination requires us to hold that district courts may not decide, independent of the NLRB, the merits of an unfair labor practice defense to enforcement of a collective bargaining agreement in a section 301 action.*" 607 F.2d at 1235 (emphasis added).

Since *Waggoner*, the Ninth Circuit has reaffirmed its position on this precise issue.[13]

Nevertheless, Kaiser asserts that the decision of the Court of Appeals here is in conflict with the law of the First and Second Circuits, citing four cases. *Local Lodge*

---

later adopted in *Huge* v. *Long's Hauling*. The District Court held:

> "[W]e do not find it within the jurisdiction of this court to pass upon the allegation that the entire Welfare and Retirement Clause of the Agreement is an unfair labor practice, and thus illegal. This is a matter within the exclusive jurisdiction of the National Labor Relations Board. [Citations omitted.]" *Lewis* v. *Seanor Coal Co.*, 256 F. Supp. 456, 460 (W.D. Pa. 1966).

[13] In *Orange Belt District Council of Painters No. 48* v. *Maloney Specialities, Inc.*, 106 LRRM 2183 (9th Cir. 1980), the Ninth Circuit reaffirmed its decision in *Waggoner* in a dispute between a union and an employer and rejected the employer's 8(e) defense.

No. 1898 of Dist. No. 38 of the IAM v. *Brake and Electric Sales Corp.*, 279 F.2d 590 (1st Cir. 1960); *Carrier Air Conditioning Co.* v. *NLRB*, 547 F.2d 1178 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977); *United Optical Workers Union Local 408* v. *Sterling Optical Co.*, 500 F.2d 220 (2d Cir. 1974); and *Todd Shipyards Corp.* v. *Industrial Union of Marine and Shipbuilding Workers of America, Local 39*, 344 F.2d 107 (2d Cir. 1965). Three of the Court of Appeals decisions do not reach or decide the issue presented here. The fourth case, *Todd Shipyards*, arose in another context, the union's right to arbitrate disputes under the contract, and rests on a misapplication of *Smith* v. *Evening News Ass'n*, *supra*.

The First Circuit case, *Local Lodge No. 1898*, neither raised nor resolved the question at issue here. There, the Court was asked to determine whether a union security clause in a collective bargaining agreement had been breached by the employer. It is true, as Kaiser contends (Pet. 24), that the District Court declared that it would not order enforcement of the clause had it determined that such an order would result in the commission of an unfair labor practice. However, that Court ruled that, in any event, no enforcement order was called for because the clause had not been breached. The Court of Appeals, addressing only the question of the contract breach, affirmed. The First Circuit never reached the unfair labor practice issue.

In the Second Circuit, *Carrier Air Conditioning* involved an appeal from the decision of the NLRB upholding a subcontracting clause in a collective bargaining agreement in the face of an 8(e) attack by an employer. Thus, *Carrier* is merely an illustration of the appropriate course for employers to follow who believe they have entered into an agreement that violates 8(e).

In both *United Optical Workers Union* and *Todd Shipyards*, on the other hand, the question of the proper

forum for resolving an unfair labor practice dispute under 8(e) arose in the context of a collective bargaining agreement that called for arbitration of differences over the contract between the union and the employer. In *United Optical Workers Union* the Court of Appeals determined that under the terms of the collective bargaining agreement, a dispute as to whether a contract clause was an unfair labor practice under 8(e) was itself committed by the parties to arbitration. Consequently, if the issue had been properly raised on appeal, the Court made clear, it would have held that the question "[w]hether the subcontracting clause violate[d] section 8(e) is at least initially in the exclusive province of the arbitrator"—not the District Court. Because the union had not cross-appealed, however, the Court of Appeals concluded it had no power to pass on the question. In short, the appellate court never reached or decided the issue presented here. 500 F.2d at 224.

The final Second Circuit decision, *Todd Shipyards*, rests upon a misapplication of the then-recent decision in *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962). As discussed above, pp. 14-16, *supra*, *Smith* held that the fact that conduct alleged to be in breach of a labor agreement might *also* constitute an unfair labor practice would not deprive the federal court of jurisdiction under Section 301 of the LMRA to decide the contract claim. That was not the case in *Todd*, where the alleged breach of contract was the employer's refusal to arbitrate which was not asserted also to be an unfair labor practice. Rather, the unfair labor practice at issue was raised by the employer as a defense to the breach of contract claim.

In short, *Smith* has no bearing on a case such as *Todd* where the unfair labor practice is not co-extensive with the Section 301 claim, but instead is raised as a defense to it. *Todd*, we believe, therefore, was wrongly decided. Our analysis of *Todd* is confirmed by the fact that this

case, now 16 years old, has never been relied upon by any other court of appeals—nor by the Second Circuit itself—as precedent for the ruling Kaiser seeks here.[14]

In sum, only one Court has reached a conclusion contrary to the decisions of the District of Columbia Court of Appeals, the Third Circuit, and the Ninth Circuit. That arguably inconsistent case in the Second Circuit arose in the context of a dispute over the right to arbitration, rested on a misapplication of *Smith* v. *Evening News Ass'n*, and was decided over a decade before the recent line of cases supporting the Trustees' position here. Given the decisions of the Third, Ninth and District of Columbia Circuits, the Second Circuit, if faced with the question again, might well reconsider its prior decision. Consequently, there is no conflict among the Courts of Appeals requiring resolution by this Court.

IV. THE AWARD OF ATTORNEYS' FEES WAS AUTHORIZED BY ERISA AND DOES NOT MERIT REVIEW.

This case was brought by the Trustees both under Section 301 of the LMRA and Section 502 of ERISA. C.A.J.A. 13. Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3) (1976), specifically provides that a civil action may be brought

> "by a . . . fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this title or the terms of the plan."

---

[14] In fact, when the *Smith* issue was analyzed by the Ninth Circuit, it specifically rejected the approach taken in *Todd. Atchison, Topeka & Santa Fe Ry.* v. *Locals 70, 85, and 315 of the International Brotherhood of Teamsters*, 511 F.2d 1193 (9th Cir. 1975).

Section 502(g) of the Act in turn authorizes the district court to award attorneys' fees "[i]n any action under this title by a . . . fiduciary." 29 U.S.C. 1132(g).[15]

As the Court of Appeals pointed out, "[i]n numerous cases, both within this circuit and elsewhere, district courts have allowed suits like this to proceed under both LMRA and ERISA, and have awarded attorneys' fees pursuant to ERISA § 502(g), 29 U.S.C. § 1132(g)." App. 34a.[16]

To the extent, however, that there could be any doubt as to the entitlement of trustees to attorneys' fees in securing payment of delinquent contributions to a health and retirement plan, such doubt was resolved with the passage of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980). Section 306 of this statute, 94 Stat. 1295, adds a new Section 515 to Title I of ERISA and amends Section 502 as follows:

> Section 515. "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement."

---

[15] The "title" referred to in Sections 502(a)(3) and (g) is Title I of ERISA, "Protection of Employee Benefit Rights."

[16] *See e.g.*, the cases cited by the Court of Appeals: *Mullins* v. *Reitz Coal Co.*, C.A. No. 78-0715 (D.D.C. Mar. 23, 1979); *Huge* v. *Reid*, 468 F. Supp. 1024 (N.D. Ala. 1979), *aff'd mem.*, 615 F.2d 916 (5th Cir. 1980); *Huge* v. *Maximeadows Mining Co.*, 459 F. Supp. 267 (N.D. Ala. 1978); *Bugher* v. *Southland Fabricators and Erectors, Inc.*, 452 F. Supp. 870 (W.D. La. 1978); *Sheet Metal Workers Pension Fund* v. *Young's Roofing, Inc.*, C.A. No. 77-1849 (D.D.C. May 3, 1978); *Huge* v. *Overly*, 445 F. Supp. 946 (W.D. Pa. 1978); *IAM National Pension Fund* v. *Ward La France Truck Corp.*, C.A. 77-1206 (D.D.C. Feb. 1, 1978); *Bugher* v. *Frash*, 98 LRRM 3010 (S.D. Ind. 1977). App. 34a, n. 14.

Section 502(a) was amended by adding the following new paragraph:

> "(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan—
>
> "(A) the unpaid contributions,
>
> "(B) interest on the unpaid contributions,
>
> * * * *
>
> "(D) *reasonable attorney's fees and costs of the action, to be paid by the defendant*, and
>
> "(E) such other legal or equitable relief as the court deems appropriate." (Emphasis added.)

Consequently, the Court of Appeals decision—which in any event properly construed Section 502 of ERISA—cannot be said to "encourage other litigants * * * 'to add perhaps unjustified ERISA claims to their suits in the hopes of recovering attorneys' fees * * *.'" Pet. 27. Congress has stated quite plainly that suits for delinquent contributions properly fall within the coverage of ERISA. Trustees, who seek payment of these contributions, Congress has specifically declared, are entitled to recover the attorneys' fees they incur in connection with any such litigation. We believe the 1980 amendments of Sections 515 and 502(a)(2) should be given effect in this pending case. *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974). However, whether or not they apply, their enactment means that the question presented here will not arise again in the future and, accordingly, deprives the attorneys' fee issue of any general interest warranting review on certiorari.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

STEPHEN J. POLLAK*
RALPH J. MOORE, JR.
WENDY S. WHITE
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

E. CALVIN GOLUMBIC
WALTER P. O'CONNELL
United Mine Workers of America Health and Retirement Funds
2021 K Street, N.W.
Washington, D.C. 20006
(202) 452-5000

Counsel for Respondents Julius Mullins et al.

* Counsel of Record

Of Counsel:

SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036

April 13, 1981

Office-Supreme Court, U.S.
FILED
APR 20 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS, *et al.*,
Respondents.

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT A. HAMMOND, III
A. DOUGLAS MELAMED *
LYNN BREGMAN
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Petitioner
Kaiser Steel Corporation

Of Counsel:
RICHARD GARY
General Counsel
Kaiser Steel Corporation
300 Lakeside Drive
Oakland, California 94666

April 20, 1981

* *Counsel of Record*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
1. Respondents' Confusion Between Remedies and Defenses Lays Bare a Fundamenal Flaw That Pervades Both Their Opposition and the Court of Appeals' Decision	1
a. The Antitrust Defense	3
b. The Labor Law Defense	5
2. There Is a Conflict in the Circuits Concerning the Jurisdiction of Federal Courts To Decide Whether Contract Provisions Violate the LMRA	8
3. The Court of Appeals' Incorrect Attorneys' Fee Decision Should Not Be Left Standing	10
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	Page
Bement v. *National Harrow Co.*, 186 U.S. 70 (1902)	4
Bull v. *United States*, 295 U.S. 247 (1935)	2
Burgess v. *M/V Tamano*, 382 F. Supp. 351 (D. Me. 1974)	2-3
Connell Construction Co. v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975)	6
Frito-Lay, Inc. v. *Retail Clerks Local 7*, 629 F.2d 653 (10th Cir. 1980)	9
Lenz v. *Wagner*, 240 F.2d 666 (5th Cir. 1957)	2
Local 1896, IAM v. *Brake and Electric Sales Corp.*, 279 F.2d 590 (1st Cir. 1960)	9
Lyons v. *Westinghouse Electric Corp.*, 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955)	6
Kelly v. *Kosuga*, 358 U.S. 516 (1959)	3, 4, 5
Perma-Line Corp. v. *Sign Pictorial & Display Local 230*, 639 F.2d 890 (2d Cir. 1981)	8-9
Todd Shipyards Corp. v. *Industrial Union of Marine and Shipbulding Workers Local 39*, 344 F.2d 107 (2d Cir. 1965)	8
Transamerica Mortgage Advisors, Inc. (TAMA) v. *Lewis*, 444 U.S. 11 (1979)	3
United Optical Workers Union Local 408 v. *Sterling Optical Co.*, 500 F.2d 220 (2d Cir. 1974)	8
United States v. *Pusey*, 47 F.2d 22 (9th Cir. 1931)	2
Vendo Co. v. *Lektro-Vend Corp.*, 433 U.S. 623 (1977)	2, 6

MISCELLANEOUS:	
U.S. Const. Art. III	7
Labor-Management Relations Act, 29 U.S.C. § 158(e) (1976)	*passim*
Labor-Management Relations Act, 29 U.S.C. §§ 158(a)(3), 158(b)(2) (1976)	9

TABLE OF AUTHORITIES—Continued

Page

Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, § 108 (1980) 10

National Labor Relations Board, 2 Legislative History of Labor-Management Reporting and Disclosure Act of 1959 (1959) 5

1A Sutherland Statutes and Statutory Construction (C. Sands ed. 1972) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1345

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS, *et al.*,
Respondents.

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Kaiser Steel has petitioned for a writ of certiorari to review a court of appeals decision that departs from the heretofore uniform rule that federal courts will not enforce illegal contracts. In their Opposition, Respondents take issue with only certain of Kaiser Steel's contentions, and their principal argument—that the illegality defense was properly denied to Kaiser Steel because other "remedies" were available—is based on a fundamental misunderstanding of the difference between remedies and defenses. We reply here to that argument and to Respondents' arguments regarding the conflict among the circuit courts and the propriety of the attorneys' fee award.

1. Respondents' Confusion Between Remedies and Defenses Lays Bare a Fundamental Flaw That Pervades Both Their Opposition and the Court of Appeals' Decision.

In Respondents' view, "[t]he crux of this case" is that "courts are not authorized to create *new remedies*" for antitrust or labor law violations.[1] For this reason, Re-

[1] Brief for Respondents in Opposition ("Opp.") at 7 (emphasis added). *See also id.* at 5, 9 & n.6, 10, 11, 12, 13, 14, 16, 17, 18, 19.

spondents argue, the court of appeals properly enforced the purchase-of-coal clause without deciding if it is illegal under the antitrust and labor laws. This concern with ensuring that Kaiser Steel is not afforded any new or unauthorized remedy is the central theme of Respondents' Opposition. It is also its central flaw.

Like the court of appeals,[2] Respondents lose sight of the fact that Kaiser Steel did not initiate this lawsuit or invoke the court's jurisdiction. Kaiser Steel never sought any "remedies" to redress violations of federal law. To the contrary, Respondents initiated these proceedings and sought from the court affirmative relief in the nature of specific performance. Kaiser Steel sought only to defeat the establishment by Respondents of a claim for relief based on a contract provision that violates the federal antitrust laws and has been declared by the federal labor laws to be "unenforcible and void."[3]

It has long been clear that a party may raise as a defense matters that it may not assert as an affirmative claim for relief. Indeed, it has repeatedly been held that a court that is without jurisdiction to decide an issue raised directly by a plaintiff may nevertheless decide the same issue when it is raised defensively.[4]

---

[2] The court of appeals also was preoccupied with making certain that Kaiser Steel is denied additional "remedies." *See* Appendix at 18a, 19a, 20a, 21a, 22a, 23a, 24a, 25a, 26a, 27a-28a, 30a-33a.

[3] Section 8(e), Labor-Management Relations Act, 29 U.S.C. § 158(e) (1976).

[4] For example, a defendant may raise defensively, to defeat a plaintiff's action, a claim that would lie within the exclusive jurisdiction of another forum if asserted offensively in an independent action for affirmative relief (*see, e.g., Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 635-36 n.6 (1977)); a claim that would be barred by the statute of limitations if asserted affirmatively (*see, e.g., Bull* v. *United States*, 295 U.S. 247 (1935)); a claim that would not satisfy the requisite jurisdictional amount if asserted affirmatively (*see, e.g., Lenz* v. *Wagner*, 240 F.2d 666 (5th Cir. 1957)); and a claim against the government that would be barred by sovereign immunity if asserted affirmatively (*see, e.g., United States* v. *Pusey*, 47 F.2d 22 (9th Cir. 1931); *Burgess*

Respondents fail to understand this distinction.[5] This failure infects their treatment of both the antitrust defense and the labor law defense.

a. *The Antitrust Defense*

Respondents rest their argument that Kaiser Steel may not raise the antitrust defense solely on their reading of this Court's decision in *Kelly* v. *Kosuga*, 358 U.S. 516 (1959).[6] But Respondents' failure to distinguish remedies from defenses has led them to misunderstand that case.

In *Kelly*, the Court was called upon to enforce a lawful agreement for the purchase of onions. The defendant argued that it should be relieved of its obligations under that lawful agreement because a separate agreement between the parties (the so-called "nondelivery agreement") violated the antitrust laws.[7]

Performance (and thus enforcement) of the purchase agreement in *Kelly* would not have caused the defendant any antitrust injury; the defendant's injury arose entirely from the nondelivery agreement whose enforcement was not at issue. Nonenforcement of the purchase agree-

---

v. *M/V Tamano*, 382 F. Supp. 351 (D. Me. 1974)). *See generally* Kaiser Steel's Petition for Certiorari ("Pet.") at 19-20 & n.29.

[5] This failure by Respondents is nowhere more apparent than in their reliance on *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11 (1979). Respondents argue, correctly, that *Transamerica* reaffirms the principle that "courts should not create new remedies where Congress has provided explicit remedies by statute . . . ." Opp. at n.6 But *Transamerica* also recognized that entertaining a defense is not the same as creating a remedy. Thus—drawing the very distinction that eludes Respondents—the Court said that, regardless whether a statute declaring certain contracts "void" creates a private cause of action for relief from a proscribed contract, at "the very least" the statute "could be raised *defensively* in private litigation *to preclude the enforcement* of . . . [such] contract." 444 U.S. at 18 (emphasis added). *See* Pet. at 17.

[6] Opp. at 7-11.

[7] *See* Pet. at 6 & n.8.

ment, on the other hand, would simply have added avoidance of that lawful agreement to the statutory treble damage and injunction remedies that were available to the defendant for any injury it may have suffered on account of the illegal nondelivery agreement. *Kelly* was thus not at all concerned with the *defense* of illegality of the purchase contract that the plaintiff had sued to enforce. The issue in that case was rather whether nonenforcement of the legal contract was an appropriate *remedy* for the collateral illegality of the nondelivery agreement.

This case, in contrast, does concern the illegality defense.[8] Here, Respondents seek to enforce the very contract provision that is alleged to violate the antitrust laws. Enforcement of that provision would both consummate the antitrust violation and inflict antitrust injury upon Kaiser Steel. But nonenforcement, far from creating additional remedies, would prevent consummation of the antitrust violation and the resultant antitrust injury, and thus the need for any antitrust remedy at all.

Kelly is thus very different from this case. Properly understood, it supports Kaiser Steel's position, for *Kelly* said that the defendant would have been permitted to

---

[8] This case is very much like *Bement* v. *National Harrow Co.*, 186 U.S. 70 (1902). In that case, the plaintiff sought to enforce two contracts that the defendant alleged violated the antitrust laws. Plaintiff argued that defendant was restricted to the injunctive and damage remedies provided by statute and thus could not raise the illegality defense. The Supreme Court rejected plaintiff's argument on the ground that, even

> "[a]ssuming that the plaintiff is right so far as regards any suit brought under [the antitrust] act, we are nevertheless of the opinion that any one sued upon a contract may set up as a defence that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defence to the action." *Id.* at 88.

The statutory "right to sue," the Court repeated, "does not prevent a private individual when sued upon a contract which is void as in violation of the act from setting it up as a defence . . . ." *Id.*

raise the illegality defense if the plaintiff had sued to enforce the illegal nondelivery agreement: That agreement, said the Court, "could not be enforced . . . ." 358 U.S. at 521. The court of appeals' decision and Respondents' Opposition demonstrate, however, that there is substantial confusion about the meaning of *Kelly* and the continued vitality of the illegality defense. This Court should grant certiorari to clarify this important issue.

b. *The Labor Law Defense*

With respect to Kaiser Steel's defense that the purchase-of-coal clause is unenforceable because it violates Section 8(e) of the Labor-Management Relations Act ("LMRA"), Respondents similarly argue that "[t]he remedy Congress defined for alleged Section 8(e) violations is the filing of a charge with the NLRB."[9] Once again, Respondents have confused remedies with defenses. The issue in this case is not whether the NLRB has exclusive jurisdiction to grant remedies to parties who wish to redress violations of Section 8(e). Rather, the issue here is whether a federal court is precluded from first determining whether a contract clause is unlawful before it grants to the plaintiffs a remedy of specific performance.

Section 8(e) addresses this issue directly: It declares that hot cargo clauses are "unenforcible and void." 29 U.S.C. § 158(e).[10] But even if the statute were silent on the enforceability of hot cargo clauses, Respondents'

---

[9] Opp. at 12-13.

[10] Respondents ignore this statutory language and focus instead on a different part of Section 8(e) that makes entering into a hot cargo agreement "an unfair labor practice." Opp. at 11. But both clauses of Section 8(e) must be taken into account. Section 8(e) *"not only* makes it an unfair labor practice to enter into a 'hot cargo' agreement, *but also,* makes it clear that such contracts are *'void and unenforcible.'"* National Labor Relations Board, 2 Legislative History of Labor-Management Reporting and Disclosure Act of 1959 at 1523 (1959) (emphasis added). Section 8(e) thus does more than make hot cargo clauses just another species of unfair labor practice; it declares that such clauses are void *ab initio* and are at all times unenforceable by the federal courts. *See* Pet. at 17-19.

argument and the court of appeals' decision would be wrong. Traditional notions of exclusive jurisdiction to grant remedies do not apply to issues that are raised by a defendant in the forum of the plaintiff's choosing. Thus, as this Court has recognized, a court may decide the merits of a defendant's claim that a contract which the court is called upon to enforce violates the law, even if that question would normally lie within the exclusive jurisdiction of another forum.[11]

Although it arose in somewhat different circumstances, *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), reflects these principles. In *Connell*, this Court decided the legality of a contract clause under Section 8(e) notwithstanding the NLRB's primary jurisdiction to pass on unfair labor practice charges under that Section. It did so because in that case, like this one, the Section 8(e) issue arose as a defense in an action "brought under independent federal remedies" and the Court was not asked to provide a remedy for a labor law violation.[12]

Respondents' answer to the suggestion in Kaiser Steel's Petition that the court of appeals' construction of the LMRA renders it unconstitutional similarly confuses de-

---

[11] *See Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 635-36 n.6 (1977) (a party may allege a violation of the federal antitrust laws as a defense to a state court contract action even though federal courts have exclusive jurisdiction over federal antitrust claims). *See also Lyons* v. *Westinghouse Elec. Corp.*, 222 F.2d 184, 190 (2d Cir.) (L. Hand, J.), *cert. denied*, 350 U.S. 825 (1955); Pet. at 19 & n.29.

[12] 421 U.S. at 626. Respondents seek to distinguish *Connell* by asserting that there "the union was not claiming that an unfair labor practice had been committed." Opp. at 14. That is true but irrelevant. In *Connell*, the employer argued (successfully) that the contract clause violated Section 8(e) in response to the union's defense that the clause was sanctioned by Section 8(e) and thus immune from antitrust scrutiny. The fact that the union did not claim that an unfair labor practice had been committed has no bearing on the Court's holding that a federal court may in the first instance decide whether a contract provision comports with Section 8(e) when the issue arises as a defense in an action seeking a remedy under a different statute.

fenses and remedies.[13] Respondents argue that "[t]he remedy that Congress determined to provide" for unfair labor practice charges "was placed in the hands of the National Labor Relations Board," that Congress decided not to create a private right of action for unfair labor practices, and that the constitutionality of that decision has been upheld.[14]

Respondents' argument misses the point entirely. This case does not call into question the constitutionality of Congress' decision to make the NLRB the exclusive forum for obtaining remedies for unfair labor practices. Rather, this case concerns the defenses that Kaiser Steel may raise when the power of a federal court is invoked to enforce an illegal contract clause. Article III of the Constitution ensures that federal courts are free fully to decide cases over which Congress gave them jurisdiction, insulated from control by the legislature, and it renders suspect the court of appeals' conclusion here that the LMRA both requires federal courts to enforce labor contracts that have not previously been subject to judicial review and prohibits those courts from examining their legality when that issue is raised as a defense.[15]

Respondents are correct when they point out that the Supreme Court has never decided a case precisely like this one.[16] The court of appeals tried to fill the gap in this Court's prior decisions in accordance with its conception of public policy. But its decision is not faithful to the statute, the prior decisions of this Court, or the

---

[13] Respondents suggest that Kaiser Steel has improperly raised this constitutional issue for the first time in this Court (Opp. at 19-20), but that is not the case. From its inception, this case has concerned the proper construction of the LMRA. It is the court of appeals' construction, which is different from the construction urged by Respondents below, that gives rise to the constitutional problem, and we have pointed out that problem in support of our contention that the court of appeals' construction of the statute is incorrect. The issue arose for the first time after the court of appeals' decision, and it is properly before this Court.

[14] Opp. at 17-19.

[15] *See* Pet. at 20-22.

[16] *See* Opp. at 14-15.

Constitution. This Court should grant certiorari to reverse the court of appeals and clarify this area of labor law.

2. There Is a Conflict in the Circuits Concerning the Jurisdiction of Federal Courts To Decide Whether Contract Provisions Violate the LMRA.

Respondents argue that the court of appeals' decision is in accord with the decisions of all other circuit courts that have decided (or at least correctly decided) the Section 8(e) issue presented in this case.[17] The contrary decisions of the Second and First Circuits, Respondents argue, either addressed the jurisdictional issue "in another context" or "never reached or decided" the issue.[18] But the conflicting conclusions that the courts have reached regarding the power of a federal court to decide the legality of a contract clause under Section 8(a) cannot be explained away so easily.

—In *United Optical Workers Union Local 408* v. *Sterling Optical Co.*, 500 F.2d 220 (2d Cir. 1974), and *Todd Shipyards Corp.* v. *Industrial Union of Marine and Shipbuilding Workers Local 39*, 344 F.2d 107 (2d Cir. 1965), the Second Circuit held that a federal court had jurisdiction to determine whether a contract violated Section 8(e) and was thus unenforceable, even though the party asserting its illegality had not taken his complaint to the NLRB.[19] More recently, in *Perma-Line*

---

[17] *Id.* at 20-21.

[18] *Id.* at 22, 23. Respondents also note, correctly, that the Ninth Circuit in holding, and the Third Circuit in dictum, agree with the court of appeals in this case. *See id.* at 20-21.

[19] Pet. at 23-24. Respondents do not dispute this reading of *Todd Shipyards*. They would distinguish *United Optical Workers* on the basis of the court's dictum that, had the union appealed, it would not have decided the Section 8(e) issue until after arbitration. That dictum, of course, neither impairs the significance of *Todd Shipyards* nor gives any support to Respondents' contention here that the NLRB has exclusive jurisdiction, and the federal courts have no jurisdiction, to decide whether contracts violate Section 8(e).

Corp. v. *Sign Pictorial & Display Local 230*, 639 F.2d 890 (2d Cir. 1981), the Second Circuit held that a federal court may decide whether a contract clause violates Sections 8(a)(3) and 8(b)(2) of the LMRA in an action brought to enforce an arbitration award, even though the NLRB had never been asked to find the clause illegal.[20]

—In *Local 1896, IAM* v. *Brake and Electric Sales Corp.*, 279 F.2d 590 (1st Cir. 1960), the First Circuit affirmed a district court judgment that decided in the first instance issues arising under Section 8(a)(3) of the LMRA. In that case, like this one, plaintiffs sued for breach of contract; in defense the employer argued that the contract clause could not be construed as plaintiffs contended because such a construction would violate Section 8(a)(3). The district court agreed with the employer, even though the NLRB had not been asked or decided under what circumstances compliance with the clause would be illegal.[21]

—In *Frito-Lay, Inc.* v. *Retail Clerks Local 7*, 629 F.2d 653 (10th Cir. 1980), the Tenth Circuit remanded for further factual proceedings a district court decision that a provision in a collective bargaining agreement violated Section 8(e). The court of appeals did not question the power of the district court to decide the Section 8(e) issue, even though the employer challenging the agreement had not taken his grievance to the NLRB.[22]

---

[20] *Perma-Line* was decided on January 23, 1981, and published in advance sheet form on April 6, 1981.

[21] Respondents would distinguish this case on the ground that the First Circuit based its affirmance on the district court's finding that the contract had not been breached. But the decision whether the clause had been breached depended on how the clause was construed, and the court of appeals accepted the district court's construction. *See* 279 F.2d at 592 & n.2. The First Circuit thus clearly recognized that a federal court may decide labor law issues in the first instance when they arise as defenses in contract enforcement actions.

[22] *Frito-Lay* was not finally decided by the Tenth Circuit until October 15, 1980, after the court of appeals' decision in this case. We did not learn of the case until after we filed our Petition.

In sum, six circuit courts have considered whether and when federal courts may determine the lawfulness of contract clauses under the labor laws. They have reached differing and conflicting conclusions. This Court should grant certiorari to resolve the conflict among the circuits.

3. The Court of Appeals' Incorrect Attorneys' Fee Decision Should Not Be Left Standing.

In defending the court of appeals' award of attorneys' fees, Respondents rely on a new statutory provision.[23] But that provision was enacted after the court of appeals' decision, and the new statute itself provides that it has no application to this case.[24] Passage of the new law actually confirms that the fee award in this case was not authorized by the applicable federal statutes.[25] This Court should reverse the court of appeals' erroneous decision to award attorneys' fees without statutory authority.

CONCLUSION

For the reasons stated above and in our Petition for Certiorari, the writ should be granted.

Respectfully submitted,

ROBERT A. HAMMOND, III
A. DOUGLAS MELAMED *
LYNN BREGMAN

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioner
Kaiser Steel Corporation

* *Counsel of Record*

Of Counsel:

RICHARD GARY
General Counsel
Kaiser Steel Corporation
300 Lakeside Drive
Oakland, California 94666

April 20, 1981

---

[23] Opp. at 25-26.

[24] *See* Section 108(e)(1), Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980).

[25] *See* 1A Sutheland Statutes and Statutory Construction 179, 178 (C. Sands ed. 1972) (It can be inferred from the enactment of the new amendment that such provision was not included in the original act and that Congress "intended to change the original act by creating a new right").

Office-Supreme Court, U.S.
FILED
JUL 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1345

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

KAISER STEEL CORPORATION,
Petitioner,
v.
JULIUS MULLINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR PETITIONER KAISER STEEL CORPORATION

ROBERT A. HAMMOND, III
A. DOUGLAS MELAMED *
LYNN BREGMAN
JOSEPH A. GRUNDFEST
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Petitioner Kaiser Steel Corporation

Of Counsel:
RICHARD GARY
General Counsel
Kaiser Steel Corporation
300 Lakeside Drive
Oakland, California 94666

July 8, 1981

* *Counsel of Record*

QUESTIONS PRESENTED FOR REVIEW

1. Whether a party to a contract provision, which he believes violates federal antitrust and labor laws and which for years no one had attempted to enforce, may raise the defense of illegality in an action brought for specific performance of the allegedly illegal provision.

2. Whether the Labor-Management Relations Act, which in Section 8(e) provides that certain types of contract clauses are "unenforcible and void," is properly construed as both granting federal courts jurisdiction to enforce collective bargaining agreements and precluding federal courts from deciding whether the clauses they are called upon to enforce violate Section 8(e).

3. Whether a federal court may award attorneys' fees to a plaintiff in an action brought to enforce a collective bargaining agreement when no applicable statute authorizes such an award.*

---

* The following were parties to the proceedings in the Court of Appeals: Kaiser Steel Corporation (appellant) and Julius Mullins, John J. O'Connell, and Paul R. Dean, in their capacities as trustees of the United Mine Workers of America Health and Retirement Funds (appellees). Harrison Combs has since replaced Julius Mullins as a trustee.

The Henry J. Kaiser Family Foundation has a 17.1% ownership interest in Kaiser Steel Corporation. Kaiser Steel Corporation has no other parent corporation or affiliate and no partially owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. FEDERAL COURTS DO NOT LEND THEIR AID TOWARDS CARRYING OUT ILLEGAL CONTRACT PROVISIONS	11
A. Enforcement of the Purchase-of-Coal Clause Would Bring About the Precise Conduct Condemned by Federal Law	15
1. Section 8(e)	15
2. Sherman Act	16
B. An Illegal Contract Clause Is Unenforceable Even If Enforcing the Clause Would Not Require Conduct That Is Itself Illegal	18
1. Prior to This Case, Courts Had Uniformly Refused To Enforce Illegal Contract Clauses, Regardless of the Lawfulness of the Remedy Itself	19
2. No Special Circumstances Warrant Exempting This Case from the Rule That Courts Do Not Enforce Illegal Contract Provisions	23

TABLE OF CONTENTS—Continued

Page

a. Availability of Other Remedies 23

b. Relative Fault 25

c. Other Considerations of Equity 28

II. FEDERAL COURTS HAVE JURISDICTION TO DECIDE WHETHER CONTRACT PROVISIONS THEY ARE ASKED TO ENFORCE VIOLATE SECTION 8(e) OF THE LMRA 31

A. A Court Always Has the Power to Decide Whether a Contract Clause It Is Asked To Enforce Violates the Law 32

B. The LMRA Authorizes Federal Courts To Decide Whether Contract Clauses They Are Asked To Enforce Violate Section 8(e) 35

1. Hot Cargo Clauses May Not Be Enforced Because Section 8(e) Provides That All Such Clauses Are "Unenforcible and Void" 35

2. In Any Event, Federal Courts Have Jurisdiction To Decide Labor Law Issues in Cases Properly Before Them on Other Grounds 41

3. As Construed by the Court of Appeals, the LMRA Would Unconstitutionally Intrude Upon the Ability of Federal Courts To Decide Contract Enforcement Actions 44

III. THE COURT OF APPEALS ERRED IN AWARDING ATTORNEYS' FEES BECAUSE NO APPLICABLE STATUTE PROVIDES FOR SUCH AN AWARD 47

CONCLUSION 50

TABLE OF AUTHORITIES

CASES: Page

Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975) 47
Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) .. 25
Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965) 28
Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962) 42
Barrows v. Jackson, 346 U.S. 249 (1953) 22
Bement v. National Harrow Co., 186 U.S. 70 (1902) 24
Bishop v. Wood, 426 U.S. 341 (1976) 2
Boatland, Inc. v. Brunswick Corp., 558 F.2d 818 (6th Cir. 1977) 33
Big Top Stores, Inc. v. Ardsley Top Shoppe, Ltd., 64 Misc. 2d 894, 315 N.Y.S.2d 897 (Sup. Ct. 1970), *aff'd*, 36 A.2d 582, 318 N.Y.S.2d 924 (App. Div. 1971) 33
Bob Jones University v. Simon, 416 U.S. 725 (1974) 46
Botany Industries, Inc. v. Amalgamated Clothing Workers, 375 F. Supp. 485 (S.D.N.Y.), *vacated as moot*, 506 F.2d 1246 (2d Cir. 1974) 40
Bradley v. Richmond School Board, 416 U.S. 696 (1974) 49
Bull v. United States, 295 U.S. 247 (1935) 32
Burgess v. M/V Tamano, 382 F. Supp. 351 (D. Me. 1974), *aff'd*, 559 F.2d 1200 (1st Cir. 1977) 32
Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39 (5th Cir. 1976) 17, 21, 26
Carrier Air Conditioning Co. v. NLRB, 547 F.2d 1178 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977) 40
Cecil B. DeMille Productions v. Woolery, 61 F.2d 45 (9th Cir. 1932) 33
Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) 42
Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975) 39, 41

TABLE OF AUTHORITIES—Continued

Page

Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902) 12
Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227 (1909) 12, 18, 19, 26
Danielson v. International Organization of Masters, Mates and Pilots, 521 F.2d 747 (2d Cir. 1975) 38, 39
De Magno v. United States, 636 F.2d 714 (D.C. Cir. 1980) 32, 46
Doherty v. Bartlett, 81 F.2d 920 (1st Cir.), *cert. denied*, 298 U.S. 676 (1936) 26
D.R. Wilder Manufacturing Co. v. Corn Products Refining Co., 236 U.S. 165 (1915) 12, 24
Eiberger v. Sony Corp., 459 F. Supp. 1276 (S.D.N.Y. 1978), *aff'd*, 622 F.2d 1068 (2d Cir. 1980) 19, 20, 26
Embrey v. Jemison, 131 U.S. 336 (1889) 28
Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc., 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963) 20, 26, 29
Farmer v. United Brotherhood of Carpenters & Joiners Local 25, 430 U.S. 290 (1977) 44
Federated Department Stores, Inc. v. Moitie, No. 79-1517 (S.Ct. June 15, 1981) 31
Frito-Lay, Inc. v. Retail Clerks Local 7, 629 F.2d 653 (10th Cir. 1980) 41
General Telephone Co. v. International Brotherhood of Electrical Workers Local 89, 554 F.2d 985 (9th Cir. 1977) 47
Greene v. United States, 376 U.S. 149 (1964) 49
Hampton House Management Corp. v. Saleh, 357 F. Supp. 591 (S.D.N.Y. 1973) 32
Huge v. Long's Hauling Co., 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979) 14, 40
Hurd v. Hodge, 334 U.S. 24 (1948) 12, 34
Inter-Continental Promotions, Inc. v. Miami Beach First National Bank, 441 F.2d 1356 (5th Cir.), *cert. denied*, 404 U.S. 850 (1971) 26
International Association of Machinists v. NLRB, 315 F.2d 33 (D.C. Cir. 1962) 15

TABLE OF AUTHORITIES—Continued

Page

International Brotherhood of Electrical Workers Local 12 v. A-1 Electric Service Inc., 535 F.2d 1 (10th Cir. 1976), *cert. denied*, 429 U.S. 832 (1976) 48

International Brotherhood of Teamsters Local 25 v. W.L. Mead, Inc., 230 F.2d 576 (1st Cir.), *dismissed per stipulation*, 352 U.S. 802 (1956) 43

International Union, UMW v. NLRB, 399 F.2d 977 (D.C. Cir. 1968) 5

Iron Workers Local 272 v. Bowen, 624 F.2d 1255 (5th Cir. 1980) 48

Kaiser-Frazer Corp. v. Otis & Co., 195 F.2d 838 (2d Cir.), *cert. denied*, 344 U.S. 856 (1952) 26, 28

Kelly v. Kosuga, 358 U.S. 516 (1959) 12, 13, 14, 15, 21, 24, 29

Kogod v. Stanley Co. of America, 186 F.2d 763 (D.C. Cir. 1950) 21, 26

Laborers' International Union Local 107 v. Kunco, Inc., 344 F. Supp. 626 (W.D. Ark. 1972), *rev'd*, 472 F.2d 456 (8th Cir. 1973) 33

Lenz v. Wagner, 240 F.2d 666 (5th Cir. 1957) 32

Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960) .. 29

Lewis v. Lowry, 295 F.2d 197 (4th Cir. 1961), *cert. denied*, 368 U.S. 977 (1962) 30

Lewis v. Mears, 297 F.2d 101 (3d Cir. 1961), *cert. denied*, 369 U.S. 873 (1962) 30

Lewis v. NLRB, 350 F.2d 801 (D.C. Cir. 1965) 5

Lewis v. Seanor Coal Co., 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968) 14, 40

Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) 42

Local 1898, IAM v. Brake and Electric Sales Corp., 279 F.2d 590 (1st Cir. 1960) 43

McLeod v. American Federation of Television and Radio Artists, 234 F.Supp. 832 (S.D.N.Y. 1964), *aff'd per curiam*, 351 F.2d 310 (2d Cir. 1965) 39

McMullen v. Hoffman, 174 U.S. 639 (1899) 11, 12, 18, 19, 22, 26, 29

Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965) 41, 44

TABLE OF AUTHORITIES—Continued

	Page
Miller v. Ammon, 145 U.S. 421 (1892)	12, 33
Mills v. Auto-Lite Co., 396 U.S. 375 (1970)	34
Montague & Co. v. Lowry, 193 U.S. 38 (1904)	13
Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971)	42, 44
Mullins v. Reitz Coal Co., C.A. No. 78-0715 (D.D.C.)	22
Nathan v. Tenna Corp., 560 F.2d 761 (7th Cir. 1977)	26, 35
National Association of Letter Carriers v. United States Postal Service, 590 F.2d 1171 (D.C. Cir. 1978)	47
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)	47
National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612 (1967)	15, 16, 38, 41
Newberry v. Washington Post Co., 438 F. Supp. 470 (D.D.C. 1977)	17
Northern v. McGraw-Edison Co., 542 F.2d 1336 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977)	17
Nyhus v. Travel Management Corp., 466 F.2d 440 (D.C. Cir. 1972)	35
Occidental Life Insurance Co. v. Pat Ryan & Associates, 496 F.2d 1255 (4th Cir.), *cert. denied*, 419 U.S. 1023 (1974)	34
Orange Belt District Council of Painters v. NLRB, 328 F.2d 534 (D.C. Cir. 1964)	15
Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)	28
Perma-Line Corp. v. Sign Pictorial & Display Local 230, 639 F.2d 890 (2d Cir. 1981)	43
Pittsburgh Die Sinkers Lodge No. 50 v. Pittsburgh Forgings Co., 255 F. Supp. 142 (W.D. Pa. 1966)	40
Premier Electrical Construction Co. v. Miller-Davis Co., 291 F. Supp. 295 (N.D. Ill. 1968), *aff'd*, 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970)	19, 21

TABLE OF AUTHORITIES—Continued

Page

Rail Reorganization Act Cases, 419 U.S. 102 (1974) 47
Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307 (5th Cir. 1976) 17
Revlon, Inc. v. Williams International, Inc., 30 Misc. 2d 772, 214 N.Y.S.2d 456 (Sup. Ct. 1961) 19, 20, 26
Riverton Coal Co. v. UMW, 453 F.2d 1035 (6th Cir.), *cert. denied*, 407 U.S. 915 (1972) 5
Shareholders Management Co. v. Gregory, 449 F.2d 326 (9th Cir. 1971) 33
Siegel v. Chicken Delight Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) 17
Small Co. v. Lamborne & Co., 267 U.S. 248 (1925) .. 12
Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942) 26
South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767 (6th Cir. 1970) 5
Tennessee Consolidated Coal Co. v. UMW, 416 F.2d 1192 (6th Cir. 1969), *cert. denied*, 397 U.S. 964 (1970) 5
Todd Shipyards Corp. v. Industrial Union of Marine and Shipbuilding Workers Local 39, 344 F.2d 107 (2d Cir. 1965) 40
Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11 (1979) 34
UMW v. Pennington, 381 U.S. 657 (1965) 5
Union Pacific Railroad Co. v. Laramie Stock Yards Co., 231 U.S. 190 (1913) 49
United Association of Journeymen & Apprentices v. Local 334, No. 80-710 (S. Ct. June 22, 1981) 42
United Optical Workers Local 708 v. Sterling Optical Co., 500 F.2d 220 (2d Cir. 1974) 40
United States v. Bayer Co., 135 F. Supp. 65 (S.D.N.Y. 1955) 20, 26, 29, 30
United States v. Grand Trunk Western Railroad Co., 50 Ad. L. 2d (P&F) 267 (W.D. Mich., Jan. 28, 1981) 32

TABLE OF AUTHORITIES—Continued

	Page
United States v. Howard, 440 F. Supp. 1106 (D. Md. 1977), *aff'd*, 590 F.2d 564 (4th Cir.), *cert. denied*, 440 U.S. 976 (1979)	46
United States v. Johnson, 323 U.S. 273 (1944)	47
United States v. Klein, 80 U.S. (13 Wall.) 128 (1872)	46
United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961)	18
United States v. Pusey, 47 F.2d 22 (9th Cir. 1931)	32
Vaca v. Sipes, 386 U.S. 171 (1967)	42, 45
Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977)	21, 33
Viacom International, Inc. v. Tandem Productions, Inc., 526 F.2d 593 (2d Cir. 1975)	30
Waggoner v. R. McGray, Inc., 607 F.2d 1229 (9th Cir. 1979)	40
Weil v. Neary, 278 U.S. 160 (1929)	12, 22
Western Electric Co. v. Communication Equipment Workers, Inc., 554 F.2d 135 (4th Cir. 1977)	47
CONSTITUTIONAL PROVISIONS AND STATUTES:	
U.S. Const. Art. III	46
Employee Retirement Income Security Act of 1974:	
Section 502, 29 U.S.C. § 1132 (1976)	8, 11, 48
Section 502(a), 29 U.S.C. § 1132(a) (1976)	2
Section 502(a)(3), 29 U.S.C. § 1132(a)(3) (1976)	48
Section 502(g), 29 U.S.C. § 1132(g) (1976)	2, 48
Labor-Management Relations Act:	
Section 8(a), 29 U.S.C. § 158(a) (1976)	43
Section 8(b)(2), 29 U.S.C. § 158(b)(2) (1976)	43
Section 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1976)	44
Section 8(e), 29 U.S.C. § 158(e) (1976)	*passim*
Section 301, 29 U.S.C. § 185 (1976)	*passim*
Section 303, 29 U.S.C. § 187 (1976)	44

TABLE OF AUTHORITIES—Continued

Page

Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980):

Section 306(a), 29 U.S.C. § 1145 (1981) 49
Section 306(b)(1), 29 U.S.C. § 1132(g)(1) (1981) 49
Section 306(b)(2), 29 U.S.C. § 1132(g)(2) (1981) 48, 49

Sherman Act:

Section 1, 15 U.S.C. § 1 (1976) 2, 8
Section 2, 15 U.S.C. § 2 (1976) 2, 8

LEGISLATIVE MATERIALS:

124 Cong. Rec. 56588 (daily ed., May 1, 1978) 49
Conf. Rep. No. 510 on H.R. 3020, 89th Cong., 1st Sess. (1947) 42
Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 90th Cong., 2d Sess. (1968) 47
National Labor Relations Board, Legislative History of Labor-Management Reporting and Disclosure Act of 1959 (1959) 36, 37, 38

MISCELLANEOUS:

Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953) 46
H. Hart and H. Weschler, The Federal Courts and the Federal System (2d ed. 1973) 46
Lockhart, *Violation of the Antitrust Laws as a Defense in Civil Actions*, 31 Minn. L. Rev. 507 (1947) 25
1A Sutherland Statutes and Statutory Construction (C. Sands ed. 1972) 49
14 Williston, Contracts § 1630A (3d ed. W. Jaeger 1972) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1345

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER KAISER STEEL CORPORATION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 642 F.2d 1302 and appears, in slip opinion form, as Appendix A to the Petition for a Writ of Certiorari.[1] The order of the district court from which appeal was taken and the district court's Memorandum Opinion, which is reported at 466 F. Supp. 911, appear as Appendix B to the Petition. The judgment of the Court of Appeals appears as Appendix C to the Petition. The orders of the Court of Appeals denying Kaiser Steel Corporation's petition for rehearing and suggestion for rehearing en banc appear as Appendix D to the Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on September 17, 1980. 642 F.2d 1302; Pet. App. 1a. A

[1] References to the Appendices to the Petition for a Writ of Certiorari are cited herein as "Pet. App. ——," and references to the Joint Appendix filed simultaneously herewith are cited herein as "J.A. ——." References to the Joint Appendix filed in the Court of Appeals are cited herein as "C.A.J.A. ——."

timely suggestion for rehearing en banc was denied, by a vote of 7 to 4, on November 12, 1980. 642 F.2d 1302; Pet. App. 84a. A timely petition for a writ of certiorari was filed on February 10, 1981. The petition was granted by order dated May 4, 1981. J.A. 79. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Sections 8(e) and 301 of the Labor-Management Relations Act, 29 U.S.C. §§ 158(e) and 185 (1976); Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1976); and Sections 502(a) and 502(g) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a) and 1132(g) (1976). These statutory provisions are set forth in Appendix E to the Petition.

STATEMENT OF THE CASE

This is an appeal from a summary judgment granting specific performance of one provision in the National Bituminous Coal Wage Agreement of 1974, a collective bargaining agreement between hundreds of coal producers, including numerous steel companies such as Kaiser Steel Corporation ("Kaiser Steel"), and the United Mine Workers of America ("UMW").[2] That provision, commonly referred to as the "purchase-of-coal clause," required signatory employers to pay a penalty or surcharge whenever they purchased coal from non-UMW coal producers. Kaiser Steel alleged that the purchase-of-coal clause violates the federal antitrust and labor laws. The lower courts held that that allegation, even if true, did not state a good defense. The basic issue in the case is whether a federal court will provide specific performance of a contract clause that is alleged to violate federal law.

---

[2] Kaiser Steel does not dispute any of the facts on which Respondents based their motion for summary judgment (J.A. 67-73). Kaiser Steel is entitled to have its version of all other facts presumed. *E.g., Bishop v. Wood*, 426 U.S. 341, 347 (1976).

History of the Dispute

This case arises out of a coal industry labor dispute that is decades old. Since at least the 1940s, the UMW has included in its collective bargaining agreements provisions designed to deter or bar trade in coal mined by coal producers whose employees are represented by another union or no union at all. During the 1940s and 1950s, the UMW included in some of its agreements with coal mine operators a "no subcontracting" clause that permitted signatory UMW operators to buy non-UMW coal only if their own employees could not produce comparable coal. C.A.J.A. 47, 570. The 1958 agreement included a "protective wage" clause that prohibited signatory UMW operators from purchasing coal from any operator who paid less than UMW wages but left signatories free to buy coal from non-UMW operators who paid wages and benefits at least as high as those paid under the UMW agreement. C.A.J.A. 477, 570.

The purchase-of-coal clause was first included in the 1964 agreement, and the UMW has insisted on retaining the clause in all its subsequent agreements. C.A.J.A. 477-78. That clause requires employers to pay to the trustees of the UMW health and retirement funds ("Respondents") a penalty or surcharge on all coal they purchase from non-UMW producers. Pet. App. 3a. Like its predecessors, the purchase-of-coal clause is intended to aid the UMW in its efforts to organize non-UMW coal producers by inducing UMW signatories not to purchase coal from—and thus to boycott—those producers. Pet. App. 35a-36a; C.A.J.A. 334, 471.[3] Unlike its predeces-

[3] This purpose has been made explicit in negotiations concerning the clause. During negotiations in 1968 and 1971, for example, the president of the UMW, who was also a trustee of the UMW's health and welfare funds, said that the UMW insists on the penalty clause because it gives the union a lever to use in its efforts to organize non-UMW producers. C.A.J.A. 470-71. The president of the UMW also made clear during negotiations over the recently-ratified 1981 agreement that the purpose of the purchase-of-coal clause is to discourage purchases of non-UMW coal.

sors, however, the purchase-of-coal clause penalizes and thus deters purchases of non-UMW coal even by employers who cannot produce comparable coal themselves and even from non-UMW producers who pay wages and benefits higher than those paid under the UMW agreements. Pet. App. 3a; C.A.J.A. 478.[4]

Steel companies negotiating with the UMW, including Kaiser Steel, have consistently objected to the purchase-of-coal clause as an overbroad and illegal restraint on their purchases of non-UMW coal.[5] For a time, they succeeded in resisting the UMW's efforts to impose the clause on them; until 1971, the UMW agreements left the steel companies free to purchase non-UMW coal for use in their manufacture of steel. C.A.J.A. 478-79. But in 1971, after a long strike, the steel companies yielded to the UMW's demands. C.A.J.A. 479. The pen-

[4] The amount of the payments called for by the purchase-of-coal clause is not related to any differences between UMW and non-UMW wage and benefit levels, to the amount of work performed by an individual employer's UMW employees or by UMW employees as a whole, or to the benefits expected to be paid to or accrued by those employees. J.A. 31-32; C.A.J.A. 280-81, 296-97, 464-65, 471. More important, the funds do not depend on the penalty payments as a source of revenue; on the contrary, the financial needs of the funds are expected to be fully satisfied by the separate contract provisions requiring signatories to make contributions to the funds for each ton of coal produced, and each hour of work performed, by their UMW employees. C.A.J.A. 296, 464-65, 471; *see* p. 6, *infra*. The funds' beneficiaries are not dependent on the penalty payments called for by the purchase-of-coal clause; wholly apart from the obligations to make contributions to the funds, the 1978 and 1981 agreements obligate signatory employers to guarantee all benefits payable by the funds to their beneficiaries.

[5] By penalizing purchases of non-UMW coal, the penalty clause benefits UMW signatory employers who sell more coal than they buy; the clause gives them an advantage, equal to the amount of the penalty, in competing with non-UMW producers for sales to other UMW signatories. By the same token, however, a UMW signatory like Kaiser Steel who buys more coal than it sells is likely to be injured by the penalty clause; it often must either pay a penalty on each ton that it buys from a non-UMW signatory or buy higher-priced coal from a UMW signatory.

alty clause was made a part of the 1971 collective bargaining agreement, and it has been included in each subsequent agreement—the 1974 agreement here at issue, the 1978 agreement, and the recently-ratified 1981 agreement.[6]

Not surprisingly, the penalty clause and its predecessors have led to almost continuous litigation before the federal courts and the National Labor Relations Board ("NLRB"). Some cases have raised the question whether such clauses are illegal hot cargo provisions.[7] In other cases, brought under the antitrust laws, it has been alleged that the clauses are used by the UMW in concert with some coal mine operators to carry out boycotts of non-UMW operators.[8] In recognition of the dubious legality of the penalty clause, the UMW has insisted since 1971 on including in its agreements a provision that would require employers to enter into negotiations over a possible substitute for the penalty clause in the event that the clause is held to be unlawful in a final, unappealable decision of a court. J.A. 32; C.A.J.A. 44, 491.

---

[6] The penalties imposed by the purchase-of-coal clause have increased over the years. Under the 1971 agreement, the penalty was $1.00 per ton for the first year and increased at six month intervals up to $1.20 per ton by the end of the term of that agreement. C.A.J.A. 478. The penalty under the 1974 agreement was $1.182 per ton for 1975 (the first year of the agreement), $1.456 for 1976, and $1.55 for 1977. *Id.* Under the 1978 agreement, it was $1.695 for the first year, $1.90 for the second and $1.895 for the third. *Id.* Under the 1981 agreement now in effect, the penalty will be $2.088 for the first year, $2.223 for the second and $2.236 for the third.

[7] *E.g., Riverton Coal Co. v. UMW*, 453 F.2d 1035 (6th Cir.), *cert. denied*, 407 U.S. 915 (1972); *International Union, UMW v. NLRB*, 399 F.2d 977 (D.C. Cir. 1968); *Lewis v. NLRB*, 350 F.2d 801 (D.C. Cir. 1965).

[8] *E.g., UMW v. Pennington*, 381 U.S. 657 (1965); *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767 (6th Cir. 1970); *Tennessee Consolidated Coal Co. v. UMW*, 416 F.2d 1192 (6th Cir. 1969), *cert. denied*, 397 U.S. 964 (1970).

Kaiser Steel Corporation

Kaiser Steel operates a steel mill in California and coal mines in Utah and New Mexico. It uses almost all of the coal produced by its mines in its steel manufacturing process. That process requires a blend of high-volatile and mid-volatile coking coals. Kaiser Steel's coal mines, however, produce only high-volatile coal, so Kaiser Steel has had to purchase its needed mid-volatile coal from another coal producer. C.A.J.A. 293, 480.

Since 1959, Kaiser Steel has purchased virtually all of its mid-volatile coal requirements from Mid-Continent Coal and Coke Company ("Mid-Continent") in Colorado. C.A.J.A. 293, 480. The UMW has repeatedly tried to organize Mid-Continent's employees and become their collective bargaining representative, but its efforts have thus far been unsuccessful. C.A.J.A. 293-94, 333-34. Mid-Continent's coal mining employees are represented by another coal mining union, and its wages and fringe benefits have consistently been higher than those provided under UMW collective bargaining agreements. C.A.J.A. 294, 329-33, 480-81.

Kaiser Steel has been a UMW signatory since the 1940s. The UMW collective bargaining agreements have over the years addressed myriad aspects of the employment relationship between signatories and their UMW employees. The 1974 agreement at issue in this case includes dozens of sections that set out the terms of compensation for Kaiser Steel's UMW employees. Among the other obligations it imposed on Kaiser Steel, the agreement required Kaiser Steel to make payments to Respondents based on the hours worked and tons of coal produced by Kaiser Steel's employees. Pet. App. 3a. Kaiser Steel made all of these payments. Pet. App. 6a.[9]

---

[9] Kaiser Steel made contributions to Respondents pursuant to the 1974 agreement totaling almost $9 million, approximately $2½ million more than the health and retirement fund benefits accrued by its employees and their dependents during that period. C.A.J.A. 479.

From the outset, however, Kaiser Steel and other steel companies refused to pay the penalties called for by the purchase-of-coal clause on the coal they purchased from non-UMW coal producers or to account to Respondents for their purchases of non-UMW coal.[10] Kaiser Steel believed that the purchase-of-coal clause was illegal and unenforceable and that compliance with the clause might subject it to antitrust suits brought by non-UMW coal producers.

Although both the union and Respondents were fully aware of the widespread refusal to comply with the purchase-of-coal clause and knew specifically at least since 1971 that Kaiser Steel regularly purchased coal from Mid-Continent without making the penalty payments,[11] neither sought to enforce the clause while the 1974 agreement was in effect. For their part, Respondents feared that the clause was illegal and that efforts to enforce it would subject them to a "rash of the antitrust suits." [12]

The Proceedings Below

Four months after expiration of the 1974 agreement, Respondents abandoned their policy of nonenforcement and commenced a series of lawsuits, beginning with this case, seeking specific performance of the purchase-of-coal clause. The complaint in this case set forth a single

---

[10] The amount of money that Kaiser Steel was called upon to pay by the purchase-of-coal clause in the 1974 agreement was one-sixth of the amount Kaiser Steel paid to the funds pursuant to that agreement based on coal produced by its employees. *See* Brief for Appellees, August 10, 1979, Appendix A at A-1; C.A.J.A. 479.

[11] Pet. App. 50a; C.A.J.A. 294 & n.5, 467-68, 470, 652-53 & n.3. In 1971, the president of the UMW—who was simultaneously serving as a trustee of the UMW health and retirement funds—urged Kaiser Steel to cease purchasing non-UMW coal from Mid-Continent. C.A.J.A. 468, 470. Over the years, other high UMW officials have repeatedly complained to Kaiser Steel about its purchases from Mid-Continent. C.A.J.A. 467-68, 471.

[12] Memorandum from the Chairman of the Board of Trustees of the UMW Health and Retirement Funds, July 19, 1974; *see* Reply Brief for Appellant, September 19, 1979, at 8 n.12.

cause of action—the assertion that Kaiser Steel breached the 1974 agreement in effect between 1974 and 1977 by failing to make the payments and reports called for by the purchase-of-coal clause. Respondents alleged jurisdiction under Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, and Section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132. J.A. 11.

Kaiser Steel defended the suit on the grounds that the purchase-of-coal clause violated Section 8(e) of the LMRA, 29 U.S.C. § 158(e), and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2; that payment of the sums called for by that clause would be illegal; and that the clause is void and unenforceable. Pet. App. 73a; J.A. 59. Kaiser Steel also denied that the court had jurisdiction under ERISA. J.A. 57; C.A.J.A. 325 n.44.

Respondents moved for summary judgment on the ground that, even if illegal, the purchase-of-coal clause should be enforced. The district court granted Respondents' motion and, without briefing or discussion, ordered Kaiser Steel to pay Respondents' attorneys' fees. Pet. App. 80a.[13]

On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the summary judgment. 642 F.2d at 1320; Pet. App. 34a. In an opinion by Judge Mikva (joined by District Court Judge Flannery), the panel held that the district court properly refused to entertain Kaiser Steel's defense of illegality and that Kaiser Steel's only recourse, long since foregone, was to have brought a declaratory judgment action against the union or to have filed a charge with the NLRB at the outset of the contract period challenging the lawfulness of the purchase-of-coal clause. 642 F.2d at 1312-13, 1317; Pet. App. 18a-19a, 27a-28a. The panel also upheld the district court's award of attorneys' fees on the

[13] The court denied, but did not reach the merits of, Kaiser Steel's cross-motion for summary judgment, in which Kaiser Steel argued that the penalty clause on its face violated Section 8(e) and was therefore "unenforcible and void." C.A.J.A. 278.

ground that Section 502 of ERISA, which authorizes fee awards, and Section 301 of the LMRA, the statute on which Respondents based their claim below but which does not authorize fee awards, are not "so surgically discrete that an action to compel welfare fund contributions required by the terms of a collective bargaining agreement cannot be maintained under both sections." 642 F.2d at 1320; Pet. App. 34a.

Circuit Judge Wilkey dissented from both holdings, finding "no reason in law or logic why any court should enforce a contract clause which plainly violates the law specifically designed to prohibit such clauses" and no statutory authority for the fee award. 642 F.2d at 1320, 1335; Pet. App. 35a, 67a. With four judges dissenting, the Court of Appeals denied Kaiser Steel's suggestion for rehearing en banc. Pet. App. 84a.

SUMMARY OF ARGUMENT

The issue in this case is whether a federal court will provide specific performance of a contract clause without considering the defense that the clause violates the antitrust and labor laws. The Court of Appeals decided the case as if the issue were whether it should "add the remedy of contract avoidance to the other forms of relief" provided by those laws. 642 F.2d at 1314; Pet. App. 22a. By failing to distinguish between "remedies" and "defenses," the court lost sight of the central question in the case—whether Respondents, who initiated this action and asked the court for relief, are entitled to the federal court remedy they seek.

I. Until this case, no court of which we are aware had ever enforced a contract provision that was alleged to be illegal without considering the merits of the illegality defense, and courts had uniformly refused to enforce provisions they found to be unlawful. The Court of Appeals in this case departed from this heretofore uniform rule.

The Court of Appeals agreed that a contract clause may not be enforced where enforcement would bring about "the precise conduct" made unlawful by federal

law, but it erroneously concluded that enforcement of the purchase-of-coal clause in this case would not have that effect. In fact, however, enforcement of the purchase-of-coal clause would have precisely the effects that both the antitrust laws and the labor laws are intended to prevent.

Moreover, the rule that courts do not act in aid of illegal contract provisions is not limited to those instances in which enforcement would require conduct that is itself illegal. It has long been the rule that courts refuse to permit a party to reap the fruits of illegal contract provisions under any circumstances or to require the payment of penalties or damages for past conduct pursuant to such provisions.

II. The Court of Appeals rejected Kaiser Steel's defense that the purchase-of-coal clause violates Section 8(e) of the LMRA on the ground that federal courts do not have jurisdiction to decide whether contract clauses they are asked to enforce violate that section. But a contract provision that violates federal law creates no enforceable rights. Thus, in order to determine whether it may enforce a contract clause, a federal court necessarily has the power to decide whether that clause violates the law.

The Court of Appeals misconstrued 8(e) of the LMRA. That section provides that hot cargo clauses, like the purchase-of-coal clause, shall be "unenforcible and void." The plain meaning of Section 8(e), its legislative history and the prior decisions of this Court make clear that courts are not to enforce such clauses and that employers may raise the illegality defense in actions brought to enforce them.

The Court of Appeals' decision also runs afoul of a more general principle, manifest in a long line of decisions, that the doctrine of primary NLRB jurisdiction does not prevent a federal court from deciding labor law issues that arise as a defense in actions properly before the court on other grounds. Indeed, if the LMRA were construed as both granting federal court jurisdiction to enforce collective bargaining agreements and precluding

federal courts from deciding whether the clauses they are called upon to enforce violate Section 8(e), it would be unconstitutional. Such a construction would impermissibly restrict the ability of the federal courts fully to resolve cases properly before them.

III. The Court of Appeals erred in awarding attorneys' fees to Respondents because no applicable statute provides for such an award. Section 301 of the LMRA does not authorize courts to award attorneys' fees, and Section 502 of ERISA does not provide jurisdiction for actions, like this one, brought to enforce a collective bargaining agreement.

ARGUMENT

In requiring Kaiser Steel to make the penalty payments called for by the purchase-of-coal clause, the Court of Appeals made two basic errors. First, it erred in holding that a federal court may enforce an illegal contract clause. Second, it erred in holding that federal courts lack jurisdiction to decide whether contract clauses they are asked to enforce violate the federal labor laws. The court also erred in affirming the award of attorneys' fees.

I. FEDERAL COURTS DO NOT LEND THEIR AID TOWARDS CARRYING OUT ILLEGAL CONTRACT PROVISIONS.

It has long been the rule that courts will not enforce illegal contracts and that an allegation that a contract provision is illegal states a good defense to an action to enforce that provision. As this Court put it in *McMullen v. Hoffman*, 174 U.S. 639, 654 (1899), "no court will lend its assistance in any way towards carrying out the terms of an illegal contract."

Courts refuse to aid plaintiffs who seek to enforce illegal agreements, not in order to benefit the defendants, but in order to protect the public interests served by laws (like the antitrust and labor laws at issue in this case) that prohibit such contract clauses, to deny plaintiffs the fruits of such illegal clauses, and to remove any incen-

tive for parties to include illegal clauses in their agreements.[14]

The rule against the enforcement of illegal contract clauses does not mean that a plaintiff who sues on a *lawful* contract provision opens himself up to every conceivable defense based on illegalities unrelated to the provision he seeks to enforce.[15] To the contrary, courts often enforce one provision of a contract even though some *other* provision or a different agreement is alleged to be illegal.[16] But when a plaintiff's case depends on proof of an *illegal* contract provision, it is open to the defendant to establish that that provision is unlawful and thus not a valid instrument upon which recovery may be based.[17]

Kelly v. Kosuga, 358 U.S. 516 (1959), illustrates these principles. In *Kelly*, the Court was asked to enforce a *lawful* agreement for the sale of onions. After taking delivery of the onions, the defendant refused to pay for them on the ground that a *separate* agreement not to deliver onions to the futures market (the

---

[14] *See Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948); *Weil v. Neary*, 278 U.S. 160, 173-74 (1929); *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 262-64 (1909); *McMullen v. Hoffman*, 174 U.S. 639, 669-70 (1899); 14 Williston, Contracts § 1630A at 22-23 (3d ed. W. Jaeger 1972).

[15] As the Court explained in *D. R. Wilder Mfg. Co. v. Corn Prod. Ref. Co.*, 236 U.S. 165, 177 (1915), a contract that is "inherently legal" cannot "be rendered illegal by considering in connection with it something which there is no right to consider at all"; a court has no "right to import into a legal and valid contract elements of wrong which there [is] no right to consider . . . ."

[16] *E.g., Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, *passim* (1902) (contracts that are "collateral" to or "independent of" a prohibited contract or event may be enforced).

[17] "[W]hen a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover." *Miller v. Ammon*, 145 U.S. 421, 426 (1892). *See also Small Co. v. Lamborne & Co.*, 267 U.S. 248, 252 (1925) (contracts "in themselves invalid" are not enforceable); *D. R. Wilder Mfg. Co. v. Corn Prod. Ref. Co.*, 236 U.S. 165, 172, 175-77 (1915).

"nondelivery agreement") violated the antitrust laws. The Court rejected this defense, stating:

> "[W]hile *the nondelivery agreement* between the parties *could not be enforced* by the court, if its unlawful character under the Sherman Act be assumed, it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price." 358 U.S. at 521 (emphasis added).

Kelly thus applied the long-settled rule that a lawful contract provision—the sale agreement at issue in that case—may be enforced, so long as it is severable from the illegal portion of the contract.[18] But it left intact, and indeed reiterated, the corollary rule that a court will not enforce an illegal contract provision.

Kaiser Steel's allegation that the purchase-of-coal clause violates the federal antitrust and labor laws states a good defense under these principles. Kaiser

---

[18] While the Court in *Kelly* recognized that words like "divisible" and "severable" often do not themselves provide a complete answer, it nevertheless made clear that a party will be able to invoke the enforcement powers of a court only if it can identify particular, lawful obligations that the court can enforce without acting in aid of illegal provisions. Thus, the Court said, where "a *lawful sale* for a fair consideration constitutes an *intelligible economic transaction in itself*," it may be enforced. 358 U.S. at 521 (emphasis added).

The Court of Appeals took this statement to mean that the illegality defense "does not lie against a contract that is 'an intelligible economic transaction in itself' " and held that, because the purchase-of-coal clause is "intelligible," its unlawfulness is no bar to its enforcement. 642 F.2d at 1310; Pet. App. 13a. But *Kelly* does not mean that an illegal contract may be enforced so long as it is "intelligible" to the enforcement court or that the illegality defense applies only to contracts that are not intelligible. Rather, *Kelly*, means that a court should look to the substance of the parties' agreement to see if the *lawful* portion is "an intelligible economic transaction in itself"—*i.e.*, separable from the illegal portion. If the lawful agreement is severable, it may be enforced. *See, e.g., Montague & Co. v. Lowry*, 193 U.S. 38, 45-46 (1904). But illegal agreements—like the nondelivery agreement in *Kelly* and the purchase-of-coal clause here—may not be enforced.

Steel did not attempt to escape any of its lawful contractual obligations under the 1974 agreement (such as the obligation to make contributions to the funds on coal produced by Kaiser Steel's own employees).[19] Rather, it resisted only complying with the purchase-of-coal clause that it alleges is itself forbidden by federal law.

By penalizing Kaiser Steel's purchases of coal from non-UMW producers, the purchase-of-coal clause has two separate illegal features: First, it constitutes an unlawful use of the UMW's bargaining power against Kaiser Steel in an effort to serve UMW objectives vis-a-vis employers like Mid-Continent who are not a part of Kaiser Steel's bargaining unit and thereby violates Section 8(e) of the LMRA. Second, it places non-UMW producers at a disadvantage in competing for sales to UMW signatories and, thus, is tantamount to a boycott of non-UMW producers in violation of the antitrust laws. On either theory, it is the purchase-of-coal clause itself, and not some collateral or separable agreement, that is illegal. Enforcement of that clause would enforce "the precise conduct made unlawful" by federal law[20] and would be an unprecedented departure from the heretofore uniform

---

[19] The defendant tried to do just that in *Lewis v. Seanor Coal Co.*, 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968). In that case, the trustees of the UMW funds sued an employer for contributions owed under the 1964 agreement on coal *produced* by its UMW employees. The employer defended on the ground that the separate *purchase*-of-coal clause violated Section 8(e). The court held that the illegality of the purchase-of-coal clause did not preclude enforcement of the separate provisions governing produced coal because Section 8(e) "merely makes a contract with such [an illegal hot cargo] provision unenforceable and void *to the extent* that it contains the 'hot cargo' provision." *Id.* at 440 (emphasis added; footnote omitted); *see* 29 U.S.C. § 158(e).

Huge v. Long's Hauling Co., 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979), is to the same effect. There, too, the employer resisted a *lawful* obligation to make pension fund contributions on the ground that a separable provision of the collective bargaining agreement and certain union activities outside the contract were illegal.

[20] *Kelly v. Kosuga*, *supra*, 358 U.S. at 520.

rule that courts do not lend their aid to the enforcement of illegal contract clauses.

A. Enforcement of the Purchase-of-Coal Clause Would Bring About the Precise Conduct Condemned by Federal Law.

The Court of Appeals recognized that a contract provision may not be enforced "where the judgment of the Court would itself be enforcing the precise conduct made unlawful" by federal law,[21] but it failed properly to apply that rule in this case. Contract provisions like the purchase-of-coal clause are among the very "restraints forbidden by federal law," and enforcement of that clause would require specific conduct, the payment of a penalty or surcharge, that both Section 8(e) and the Sherman Act forbid.

1. *Section 8(e)*

Requiring Kaiser Steel to pay a penalty for dealing with Mid-Continent would cause the very injury that Section 8(e) of the LMRA is principally intended to prevent. Section 8(e) makes unlawful—indeed, "unenforcible and void"—any provision in a collective bargaining agreement that prohibits or penalizes an employer for doing business with another person if a purpose or effect of the provision is to achieve union objectives outside the employer's work unit.[22] Such provisions are known as "hot cargo" agreements.

The purpose of the prohibition of hot cargo agreements is to prevent a union from using its bargaining power in one work unit to advance union objectives (such as organizing non-union employees) outside that work unit. *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 622-26, 633-35 (1967). In pro-

---

[21] 642 F.2d at 1309; Pet. App. 12a, *quoting Kelly v. Kosuga*, *supra*, 358 U.S. at 520.

[22] *See, e.g., National Woodwork Mfrs. Ass'n. v. NLRB*, 386 U.S. 612 (1967); *International Ass'n of Machinists v. NLRB*, 315 F.2d 33 (D.C. Cir. 1962); *Orange Belt District Council of Painters v. NLRB*, 328 F.2d 534 (D.C. Cir. 1964).

scribing such agreements, Congress intended in part to protect employers outside the work unit (like Mid-Continent) with whom a union has a dispute from being subjected to a boycott by other, "neutral" employers (like Kaiser Steel). But its principal purpose in enacting Section 8(e) was to protect *neutral employers* like Kaiser Steel from being caught in the middle of the union's dispute with other parties. As this Court emphasized in *National Woodwork*, shielding "neutral employers" from the burdens of hot cargo provisions is the "touchstone" and "central theme" of Section 8(e). *Id.* at 624-25, 627, 635, 645.

The Court of Appeals believed that enforcement of the purchase-of-coal clause would not cause unlawful conduct because it could no longer cause Kaiser Steel to boycott Mid-Continent during the term of the expired 1974 agreement. But compelling payments of the penalties called for by the 1974 agreement would penalize Kaiser Steel for having done business with Mid-Continent during the contract period.[23] By enforcing the unlawful purchase-of-coal clause, the Court of Appeals would thus cause the precise injury that Section 8(e) is primarily intended to prevent—harm to the neutral employer, Kaiser Steel. The decision undermines the principal objective of Section 8(e) and cannot be reconciled with the teachings of *National Woodwork*.

2. *Sherman Act*

Enforcement of the purchase-of-coal clause would also bring about injury that the antitrust laws are intended

---

[23] Moreover, enforcing the purchase-of-coal clause would be likely to cause future boycotts of non-UMW coal producers like Mid-Continent and thus bring about the very injury with which the Court of Appeals was concerned. Both the 1978 and 1981 UMW agreements contain provisions that are in all pertinent respects identical to the purchase-of-coal clause; other agreements in the future would be likely also to include illegal hot cargo clauses, especially if the illegality defense were denied in this case. In making purchasing decisions in the future, employers subject to these penalty clauses would undoubtedly be induced by the decision in this case to boycott non-union suppliers.

to prevent. The clause violates the Sherman Act by imposing an unlawful surcharge or penalty on purchasers who, like Kaiser Steel, buy some of their coal requirements from non-UMW producers. The clause is unlawful both because it impairs the ability of non-UMW producers to compete with UMW producers for sales to purchasers such as Kaiser Steel and because it penalizes such purchasers when they choose their suppliers on the basis of competitive merit.[24]

Kaiser Steel has not yet suffered injury cognizable under the antitrust laws because it has refused to participate in the boycott and has not yet paid the penalty for its refusal. Ordering Kaiser Steel to make the penalty payments called for by the purchase-of-coal clause would, however, subject Kaiser Steel to an injury—payment of an unlawful penalty—that the antitrust laws are intended to prevent.[25] It would also give Kaiser Steel and others an incentive not to do business with non-UMW producers in the future. The court's decision enforcing the clause would thus cause the precise conduct made unlawful by the antitrust laws and deprive Kaiser

---

[24] The penalty clause has these effects even though it does not flatly prohibit trade with non-UMW producers. Contractual provisions designed to prevent a purchaser from dealing with competing suppliers are commonly enforced by provisions that require the purchaser to pay a penalty whenever he does business with a competing supplier. *See* pp. 20-21, *infra*. Where such clauses violate the antitrust laws, the purchaser as well as competing suppliers may recover damages. *E.g., Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1344, 1347 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Siegel v. Chicken Delight Inc.*, 448 F.2d 43, 52 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

[25] Because it is unlawful to require purchasers to make payments pursuant to such a clause, those who are required to make such payments may recover three times their amount as treble damages under the antitrust laws. *See, e.g., Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976); *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976); *Newberry v. Washington Post Co.*, 438 F. Supp. 470 (D.D.C. 1977).

Steel and the public "of the protection which Congress has conferred." [26]

B. An Illegal Contract Clause Is Unenforceable Even If Enforcing the Clause Would Not Require Conduct That Is Itself Illegal.

Even if the Court of Appeals were correct in believing that neither Section 8(e) nor the anti-trust laws was intended to prevent the kind of injury Kaiser Steel would suffer if required to make payments pursuant to the purchase-of-coal clause, its decision would still be wrong. The rule that courts do not act in aid of illegal contracts is not limited to those instances in which the court's remedy would require conduct that is itself illegal or cause the particular kind of injury the laws were intended to prevent. To the contrary, courts refuse to enforce "any alleged rights directly springing from [an illegal] contract" [27] and will thus deny their aid to parties "seeking to realize the fruits of an agreement that appears to be tainted with illegality." [28]

If the Court of Appeals' view of the law were correct, a hired murderer, after performing his part of a contract to kill, could prevail in a suit for the contract price on the theory that compelling payment would not bring

---

[26] *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961).

[27] *McMullen v. Hoffman, supra*, 174 U.S. at 654.

[28] *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 262 (1909). In reaching the opposite conclusion, the Court of Appeals relied on the language in *Kelly* that distinguished that case from one "where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the [Sherman] Act . . . ." 358 U.S. at 520, *quoted at* 642 F.2d at 1309; Pet. App. 12a. The Court of Appeals read that language as if the phrase "enforcing the precise conduct" meant "requiring illegal remedial steps." But *Kelly* was concerned with the circumstances under which *lawful* agreements—like the sale agreement there at issue—could be enforced. *See* n.39, *infra*. The Court's language and the context in which it was used make it more plausible to construe the quoted phrase to mean "enforcing the particular illegal contractual promise."

about a homicide and thus would not cause the very conduct forbidden by law. That is not the law.

1. *Prior to This Case, Courts Had Uniformly Refused To Enforce Illegal Contract Clauses, Regardless of the Lawfulness of the Remedy Itself.*

As far as we have been able to determine, until this case no court had ever enforced an illegal contract clause. Regardless whether their orders would bring about conduct that is itself illegal, courts have uniformly refused to lend their aid to illegal agreements, either by distributing "'the profits realized'" therefrom or by awarding "'damages or compensation for the breach'" thereof. *McMullen v. Hoffman, supra*, 174 U.S. at 663.[29]

In *McMullen v. Hoffman*, for example, the Court denied the plaintiff's suit for an accounting of profits derived from an illegal bid-fixing scheme, even though the illegal scheme had already ended and the accounting would not have brought about any of the effects that the law barring bid-fixing was designed to prevent. As the Court stated: "In the case before us the cause of action grows directly out of the illegal contract, and if the court distributes the profits it enforces the contract which is illegal."[30]

---

[29] The Court of Appeals evidently thought that this case was somehow different from all the rest because the purchase-of-coal clause in the 1974 agreement had not yet been held to be illegal and the issue was therefore whether "the district court properly declined to entertain the defense" of illegality. 642 F.2d at 1308 n.6; Pet. App. 9a n.6. But in almost all of the cases in which enforcement of a contract clause was refused on grounds of illegality, the contract provision had not previously been found to be unlawful. *See, e.g., Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 (1909); *McMullen v. Hoffman, supra; Eiberger v. Sony Corp.*, 459 F. Supp. 1276 (S.D.N.Y. 1978), *aff'd*, 622 F.2d 1068 (2d Cir. 1980); *Premier Elec. Constr. Co. v. Miller-Davis Co.*, 291 F. Supp. 295 (N.D. Ill. 1968), *aff'd*, 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970); *Revlon, Inc. v. Williams Int'l, Inc.*, 30 Misc. 2d 772, 214 N.Y.S.2d 456 (Sup. Ct. 1961).

[30] 174 U.S. at 660.

Similarly, in *Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc.*, 307 F.2d 207, 210 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963), the court refused to give effect to an illegal market allocation agreement between the parties by awarding the plaintiff "its share of the spoils," rejecting the plaintiff's argument that an accounting of profits should be granted because it would not effectuate any illegal allocation of markets. *See also United States v. Bayer Co.*, 135 F. Supp. 65, 72-73 (S.D.N.Y. 1955).

In other cases, courts have repeatedly refused to enforce contract provisions—like the purchase-of-coal clause at issue here—that called for payments to be made on account of certain commercial conduct, even though the conduct had already been completed and the contract had already expired. *Eiberger v. Sony Corp.*, 459 F. Supp. 1276 (S.D.N.Y. 1978), *aff'd*, 622 F.2d 1068 (2d Cir. 1980), for example, was an antitrust action in which Sony sought by way of a counterclaim sums owed for merchandise purchased by the plaintiff distributor under his franchise agreement, as well as accrued "warranty fees" that were to be paid for sales made by the distributor outside his assigned territory. The court recognized that the warranty fees were "an economic penalty" imposed for extraterritorial dealing; while it upheld Sony's claim on the lawful part of the contract for sums owed for purchased merchandise, it said that the "illegal levy or charge" in the form of the warranty fees "cannot be recovered." [31] It reached that result even though the distributorship had terminated and enforcement of the fee provision would not have restricted the distributor to his territory. *Revlon, Inc. v. Williams International, Inc.*, 30 Misc.2d 772, 214 N.Y.S.2d 456 (Sup. Ct. 1961),[32] and

---

[31] 459 F. Supp. 1283, 1289.

[32] In *Revlon*, a manufacturer sued to enforce a provision in a contract with its distributor that entitled the manufacturer to "liquidated damages" for any sales the distributor made outside specified foreign countries. The distributor defended on the ground that the liquidated damages provision was a penalty clause that violated the

Kogod v. Stanley Co. of America, 186 F.2d 763 (D.C. Cir. 1950),[33] are to the same effect.[34]

In none of these cases would enforcement of the illegal clause have brought about conduct that was itself specifically prohibited by law, yet in each case the court refused to enforce the clause. These cases were correctly decided, and their lesson is clear: Courts will not enforce illegal contract clauses by requiring payment of

---

antitrust laws. The manufacturer moved to strike the defense, but the court denied the motion. It held that the defense was valid under *Kelly v. Kosuga* because, in asserting the illegality of the penalty clause, the defendant distributor was attempting, not to avoid paying for goods received, but to prevent the manufacturer from reaping the fruits of the "plan of distribution which the defendant says is illegal." 214 N.Y.S.2d at 460.

[33] In *Kogod*, a three-party contract provided that if Stanley and K-B did not designate within two years a site on which Kass would build a theatre, Stanley and K-B would pay Kass $100,000 as damages. Stanley and K-B did not reach agreement, and Kass sought to enforce the damage provision. The court refused to enforce the provision on the ground that the contract was an agreement to build a new theatre located so as not to compete with any of Stanley's or K-B's theatres, in violation of the antitrust laws. Under such circumstances, the court said, "Kass [could not] be heard to complain of the failure of Stanley and K-B to carry out an agreement to suppress competition and extend monopoly in violation of the Sherman Anti-Trust Act," even though enforcing the damage provision would not itself have injured competition between Stanley and K-B. 186 F.2d at 765.

[34] *See also Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39, 55 n.6 (5th Cir. 1976) (court would not enforce a "20% penalty provision for buying outside," because the plaintiff "would be enlisting the Court's aid in directly breaching the antitrust laws."); *Premier Elec. Constr. Co. v. Miller-Davis Co.*, 291 F. Supp. 295 (N.D. Ill. 1968), *aff'd*, 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970) (refusing damages for breach of a subcontracting agreement conditioned on an illegal bid-fixing scheme).

In *Vendo Co. v. Lektro-Vend Corp.*, four Justices of this Court concluded that enforcement of contract clauses in such cases " 'would be to make the courts a party to carrying out one of the very restraints forbidden by the Sherman Act.' " 433 U.S. 623, 646 n.3 (1977) (Stevens, J., dissenting). The majority of the Court had no occasion to pass on this question.

penalties, profits or damages for past conduct. The Court of Appeals erred because it disregarded this heretofore uniform principle.[35]

If the law were as the Court of Appeals held, sellers with great bargaining power would be able routinely to impose illegal penalties on their customers' purchases from competing suppliers and thereby to induce some customers not to do business with the competitors and to collect illegal penalties from those customers who chose to do so. It is precisely in order to guard against such consequences that courts do not enforce such illegal contract provisions. As the Supreme Court put it in *McMullen v. Hoffman*, the illegality defense

> "is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly toward reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them." 174 U.S. at 669-70.[36]

---

[35] The only case, other than this case, of which we are aware in which a court has ordered enforcement of a contract clause alleged to be illegal is *Mullins v. Reitz Coal Co.*, C.A. No. 78-0715 (D.D.C.). That case was decided by the United States District Court for the District of Columbia after the district court's decision in this case; Respondents here are also plaintiffs in that case, and they made the same arguments there. We believe the decision in *Reitz* is incorrect. The proceedings in that case have been stayed pending resolution of this case. *See also* n.73, *infra*.

[36] *See also Barrows v. Jackson*, 346 U.S. 249, 254 (1953) (when a court enforces an illegal agreement by awarding damages for its breach, "[t]he result of that sanction by the State would be to encourage the use of [such illegal] covenants"); *Weil v. Neary*, 278 U.S. 160, 173-74 (1929) ("What is struck at in the refusal to enforce [illegal] contracts" is "not only actual evil results but their

2. *No Special Circumstances Warrant Exempting This Case from the Rule That Courts Do Not Enforce Illegal Contract Provisions.*

The Court of Appeals virtually ignored the public interests sought to be served by the rule that courts do not enforce illegal contract clauses. Focusing instead on what it perceived as the proper accommodation of the private interests of the litigants, it concluded that the purchase-of-coal clause should be enforced even if it is illegal. The court set forth, in effect, three bases for its conclusion: first, the availability to Kaiser Steel of other remedies for the violations of federal law; second, its view of the parties' relative fault; and third, other considerations of equity. None of these reasons finds any support in the case law, and none of them would make sound policy.

a. *Availability of Other Remedies*

The Court of Appeals adverted repeatedly to the "other remedies" available to Kaiser Steel for the illegal purchase-of-coal clause.[37] Indeed, it decided the case as if the question were whether it should "add the remedy of contract avoidance to the other forms of relief" provided by the antitrust and labor laws.[38] But that is not the question. This case has nothing to do with Kaiser Steel's entitlement to a remedy for a violation of the antitrust and labor laws. The Court of Appeals' analysis is fundamentally flawed because it failed to take into account the distinction between remedies and defenses.

Kaiser Steel did not initiate this lawsuit or invoke the court's jurisdiction. Kaiser Steel did not seek any "remedy" to redress violations of federal law. It was Respondents who initiated these proceedings, and sought

---

tendency to evil in other cases . . . . Enforcement of such contracts when actual evil does not follow would destroy the safeguards of the law and lessen the prevention of abuses.").

[37] 642 F.2d at 1318; Pet. App. 30a; *see also* 642 F.2d at 1312, 1313, 1314, 1315, 1318-20; Pet. App. 18a, 21a, 22a, 23a, 30a-33a.

[38] 642 F.2d at 1314; Pet. App. 22a.

from the court affirmative relief in the nature of specific performance. Kaiser Steel sought only to defeat the establishment by Respondents of a claim for relief based on a contract provision that violates federal law.

This case is thus virtually identical to *Bement v. National Harrow Co.*, 186 U.S. 70 (1902). There, the plaintiff sought to enforce two contracts that the defendant alleged violated the antitrust laws. Plaintiff argued that defendant was restricted to the injunctive and damage remedies provided by statute and thus could not raise the illegality defense. The Supreme Court rejected plaintiff's argument on the ground that, even

> "[a]ssuming that the plaintiff is right so far as regards any suit brought under [the antitrust] act, we are nevertheless of the opinion that any one sued upon a contract may set up as a defence that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defence to the action." *Id.* at 88.

The statutory "right to sue," the Court repeated, "does not prevent a private individual when sued upon a contract which is void as in violation of the act from setting it up as a defence . . . ." *Id.*

No case is to the contrary.[39] Indeed, if the law were otherwise—if the availability of affirmative remedies could

---

[39] The Court of Appeals' reluctance to provide Kaiser Steel with "another means of redress" (642 F.2d at 1319; Pet. App. 31a) for the violations of federal law inherent in the purchase-of-coal clause stemmed in part from its misunderstanding of *Kelly v. Kosuga*, *supra*. *Kelly* did not involve the *defense* of illegality of the sale contract that the plaintiff there had sued to enforce; the legality of that contract was not assailed. Rather, the issue in *Kelly* was, in effect, whether the court should have supplemented the statutory treble damage and injunction remedies available to the defendant for the illegality of the separate "nondelivery agreement" with the additional *remedy* of nonenforcement of the lawful sale contract. *See D. R. Wilder Mfg. Co. v. Corn Prod. Ref. Co.*, 236 U.S. 165, 177 (1915) (a collateral antitrust violation may not be "indirectly attacked" by way of a defense to a contract action to which it is not relevant).

render the illegality defense unavailable—then there could almost never be an illegality defense. In that event, courts would routinely be called upon to participate in schemes that violate federal law and to enforce a whole range of illegal contracts. Certainly Congress did not intend to achieve that result by creating affirmative remedies for violations of federal law.[40]

b. *Relative Fault*

The Court of Appeals based its decision in part on its assessment of the "relative fault" of the parties.[41] It concluded that Kaiser Steel should be barred from raising the illegality defense because it had previously "ignored" the purchase-of-coal clause without pursuing "its opportunities for a timely and direct adjudication of its rights."[42] Since Kaiser Steel did not challenge the purchase-of-coal clause during the term of the agreement, the Court said, it in effect had waived its right and should now be estopped to object to the purchase-of-coal clause on account of its unlawfulness.

Just as reliance on the availability of other remedies would, in essence, eliminate the defense of illegality, so too would reliance on notions of waiver amount to writing the defense of illegality out of the law. By definition, a party can raise a *defense* of illegality only after having waited until suit is brought against it. Yet, before this case, no court of which we are aware had ever held that a defendant could be deemed to have

---

[40] *See* Lockhart, *Violation of the Antitrust Laws as a Defense in Civil Actions*, 31 Minn. L. Rev. 507, 514 (1947) (nothing in the Sherman Act indicates "any intention to take away that sanction [nonenforcement] which had been the very tool by which the common law policy against restraint of trade had been developed."). *See also Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497-98 (1940).

[41] *See* 642 F.2d at 1311; Pet. App. 15a.

[42] 642 F.2d at 1312; Pet. App. 18a. Kaiser Steel's "strategy," said the court below, "betokens such unclean hands that it weighs against permitting Kaiser to raise the illegality defense." *Id.* (footnote omitted).

waived its right to resist compliance with an unlawful contract clause.[43]

To the contrary, in case after case, courts have refused to enforce contract clauses that were alleged to be illegal, even though the defendant had made no effort to challenge the clause earlier, the plaintiff had performed all of his obligations and the contract had expired by its terms.[44] As this Court has said, notions of waiver or estoppel have no place in an action to enforce a contract that violates the law[45] and "will not be permitted to thwart the purposes of statutes of the United States" that make certain kinds of contracts illegal.[46]

Applying waiver principles to preclude a court from examining the illegality of the purchase-of-coal clause in cases such as this not only would be bad law, but also would inequitably and unwisely allocate responsibility between the parties. Respondents long knew that Kaiser Steel was regularly purchasing coal from non-

---

[43] The authorities upon which the Court of Appeals relied for the proposition that " 'the relative guilt of the parties' " is relevant "in deciding whether to enforce an illegal contract" (642 F.2d at 1311; Pet. App. 15a) are not to the contrary. Most of those authorities have nothing to do with enforcement of illegal contract provisions, and the few that are relevant suggest only that courts may in certain circumstances enforce lawful promises made for unlawful consideration. 642 F.2d at 1311; Pet. App. 15a-16a.

[44] *E.g., McMullen v. Hoffman, supra; Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc., supra; Kogod v. Stanley Co. of America, supra; Eiberger v. Sony Corp., supra; United States v. Bayer Co., supra; Revlon, Inc. v. Williams Int'l, Inc., supra; see also Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976).

[45] *See Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 263 (1909).

[46] *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942). *See also, e.g., Nathan v. Tenna Corp.*, 560 F.2d 761 (7th Cir. 1977); *Inter-Continental Promotions, Inc. v. Miami Beach First Nat'l Bank*, 441 F.2d 1356 (5th Cir.), *cert. denied*, 404 U.S. 850 (1971); *Kaiser-Frazer Corp. v. Otis & Co.*, 195 F.2d 838, 843-44 (2d Cir.), *cert. denied*, 344 U.S. 856 (1952); *Doherty v. Bartlett*, 81 F.2d 920 (1st Cir.), *cert. denied*, 298 U.S. 676 (1936).

UMW producers without complying with the purchase-of-coal clause. Both Respondents and Kaiser Steel long doubted the legality of the purchase-of-coal clause. And both Respondents and Kaiser Steel could have brought suit sooner, but both chose not to. If anyone should be charged with the risk of inaction, it is Respondents. Only they knew whether they intended to abandon their longstanding policy of nonenforcement and thus make litigation regarding the lawfulness of the clause necessary.[47]

If left to stand, the Court of Appeals' decision would lead to a proliferation of what may be wholly unnecessary lawsuits. Had Kaiser Steel known that it would be unable to defend against an action to enforce the penalty clause by challenging the lawfulness of the clause, it could not prudently have refrained from initiating litigation, even in the face of Respondents' longstanding policy of not enforcing the purchase-of-coal clause. If the decision is left to stand, similarly situated parties in the future would have to bring suit promptly, even where enforcement is unanticipated or unlikely. In that event, litigation would abound, and the prospect of peaceful resolution of disputes regarding allegedly unlawful contract clauses would be lost.

---

[47] In concluding that Kaiser Steel's challenge to the purchase-of-coal clause was untimely, the Court of Appeals pointed to a provision in the 1974 agreement that required employers to enter negotiations concerning a possible substitute for the purchase-of-coal clause in the event that a final, unappealable judicial decision rendered that clause unenforceable. 642 F.2d at 1312-13; Pet. App. 17a-19a. The court evidently believed that that provision gave Kaiser Steel an incentive to wait until after the expiration of the contract to litigate the lawfulness of the purchase-of-coal clause. But Kaiser Steel "waited" to litigate the legality of the purchase-of-coal clause only until enforcement of the clause was first sought. The court's reliance on the renegotiation provision to justify its enforcing the illegal purchase-of-coal clause cannot be squared with the uniform rule that waiver and related doctrines do not apply to the illegality defense, with the public policies served by the illegality defense, or with the fact that Respondents were in a better position than Kaiser Steel to know whether and when to commence litigation and thus should bear the burden of inaction.

c. *Other Considerations of Equity*

Under the general rubric of "considerations of equity," the Court of Appeals in various ways expressed its concern that nonenforcement of the purchase-of-coal clause would unjustly enrich Kaiser Steel.[48] That is not the case, and, in any event, a contract that contravenes public policy is unenforceable regardless how the court balances "the equities as between the parties . . . ."[49]

Recognition of the illegality defense always relieves the defendant of an obligation he undertook and denies the plaintiff a benefit for which he bargained. Yet no court before now has seen fit to enforce an illegal agreement on the ground of unjust enrichment. To the contrary, courts have uniformly held that they will leave the parties where they find them instead of aiding them to enforce agreements that violate public laws.[50] Courts have accordingly refused to enforce contract clauses that were alleged to be illegal where the plaintiff was suing for money owed for services previously rendered or goods previously supplied,[51] where the defendant had benefited from the contract as a whole and had received all the consideration due him,[52] where the plaintiff had per-

---

[48] 642 F.2d at 1311-13; Pet. App. 15a-19a.

[49] *Kaiser-Frazer Corp. v. Otis & Co.*, 195 F.2d 838, 844 (2d Cir.), *cert. denied*, 344 U.S. 856 (1952).

[50] *See Embrey v. Jemison*, 131 U.S. 336, 348-49 (1889) (payments called for by an illegal contract are " 'tainted with [the] illegality [of that contract]' " and " 'do [not] represent anything of value in the hands of the defendant which, in good conscience, belongs to the plaintiff' "). *Cf. Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968).

[51] *See, e.g.*, cases cited at n.44, *supra*.

[52] *See, e.g.*, cases cited at n.44, *supra*, and *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965). In all these cases, the illegal contract clause was a part of the overall consideration promised by the defendant. Still, the courts refused to enforce the illegal clauses, leaving the plaintiffs to be satisfied solely by their lawful consideration.

By the same token, the fact that the penalty clause in this case might be said to be a part of the total consideration paid by Kaiser

formed all of his obligations,[53] and even where the defendant benefited from the illegal clause itself.[54]

Respondents are not immune from these rules simply because they are pension fund trustees.[55] Employers should of course be required to comply with lawful obligations to make payments to pension funds. But there is nothing in the law that suggests that such funds are exempt from the rule that courts do not enforce illegal contract clauses.[56]

Steel provides no basis for enforcing it. In the first place, the consideration sought by the union in this case was a boycott of non-UMW coal producers. Even the Court of Appeals agrees that a court could not enforce payment of that consideration. *See* n.66, *infra*. Moreover, Kaiser Steel has paid all other consideration under the 1974 agreement—wages and benefits for labor actually performed in producing coal, including $9 million in contributions to the health and pension funds from 1974 to 1977 alone. It has refused to pay only the illegal penalty, which bears no relation to the amount or value of any labor performed by Kaiser Steel's employees. (This case is thus a far cry from *Kelly v. Kosuga*, in which the defendant had received plaintiff's onions and then refused to pay the consideration for them for reasons unrelated to the lawfulness of the sale agreement sought to be enforced. It was in that context that the Court in *Kelly* expressed concern about " 'preventing people from getting other people's property for nothing when they purport to be buying it.' " 358 U.S. at 520-21.)

[53] *See* cases cited at n.44, *supra*.

[54] *E.g., McMullen v. Hoffman, supra; Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc., supra; United States v. Bayer Co., supra.*

[55] While the Court of Appeals recognized that, "[a]s a rule, third-party beneficiaries, like the Trustees here, are subject to the contract defenses of nonperforming promisors," it nevertheless held that Respondents enjoy a "special status" that entitles them to an "exemption" from those defenses in this case. 642 F.2d at 1312; Pet. App. 17a.

[56] *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), cited by the Court of Appeals, is not to the contrary. The Supreme Court there held that an employer's right to set off money owed to it by a union on account of an illegal strike against contributions owed by it to a pension fund pursuant to a lawful contract provision depended on whether the contract made performance by the union a condition precedent to the employer's duty to make the contributions. *Id.*

Creating such an exemption would provide an incentive for the inclusion of illegal clauses in future contracts[57] and would thus be unwise as a matter of policy, as well as wrong as a matter of law.[58] If pension fund trustees

---

at 465. The Court's opinion did not involve an unlawful contract clause, nor did it suggest that trustees may enforce such clauses. *Cf. Lewis v. Mears*, 297 F.2d 101, 104 (3d Cir.), *cert. denied*, 369 U.S. 873 (1962); *Lewis v. Lowry*, 295 F.2d 197, 199 (4th Cir. 1961), *cert. denied*, 368 U.S. 977 (1962).

The Court of Appeals also cited *Viacom Int'l, Inc. v. Tandem Productions, Inc.*, 526 F.2d 593 (2d Cir. 1975), in which an assignee was permitted to enforce an exclusive distributorship agreement that the defendant alleged was part of a broader, illegal tying arrangement involving production, syndication and distribution rights. The court rejected the illegality defense because the assignee had acquired and sought to enforce only the distributorship agreement and that agreement standing by itself was not illegal. The court reasoned that whether a contract could be enforced would "depend on the court's perception of the contract as a separate or 'collateral' entity or as an integral part" of the illegal agreement. 526 F.2d at 598.

[57] Judge Weinfeld saw this danger in *United States v. Bayer Co.*, *supra*. In that case, an assignee of a party to an agreement that violated the antitrust laws, but had long since expired, sued another party to the agreement for the assignor's share of the profits from the conspiracy. The assignee argued that it was not a party to the unlawful scheme and that, if it could not recover the monies owed, the co-conspirator would get a windfall. Judge Weinfeld rejected that argument, holding instead that courts do not aid anyone seeking to enforce or realize the fruits of an unlawful agreement. He reasoned that upholding the assignee's argument

> "would at once recognize an effective means to frustrate the intent of the anti-trust laws. Under this concept all a . . . party to an illegal agreement need do is to . . . effect an assignment of the proceeds of the agreement . . . and have its assignee enjoy the fruits of the illegal contract free of governmental sanction. The public policy underlying the anti-trust laws is not to be frustrated so easily." 135 F. Supp. at 72.

[58] Rules of law that apply unequally to different classes of litigants are inherently suspect. There is no apparent reason why pension fund trustees should be preferred in contract enforcement actions over defendants such as trustees of eleemosynary institu-

could enforce illegal contracts that require payments to them, parties would be able to circumvent the antitrust and labor laws simply by casting illegal restraints in the form of clauses that require penalty payments to such funds.[39]

II. FEDERAL COURTS HAVE JURISDICTION TO DECIDE WHETHER CONTRACT PROVISIONS THEY ARE ASKED TO ENFORCE VIOLATE SECTION 8(e) OF THE LMRA.

Section 8(e) of the LMRA prohibits certain types of contract clauses and provides that all such clauses are "unenforcible and void." 29 U.S.C. § 158(e). Notwithstanding this clear statutory command, the Court of Appeals held that the district court did not have jurisdiction to determine whether the purchase-of-coal clause violated Section 8(e), even in an action brought for specific performance of that clause. Only the NLRB, said the court, can decide in the first instance whether a contract clause violates Section 8(e).

The Court of Appeals' decision rests on its fundamental misunderstanding of the distinction between remedies and defenses. Moreover, its construction of the LMRA cannot be reconciled with the statute or the prior

---

tions (*see, e.g.*, Brief *Amicus Curiae* of the Trustees of Boston University in Support of Petition for Writ of Certiorari, April 23, 1981). Indeed, pension fund trustees could themselves wind up as defendants in actions similar to this; in that event, would the court enforce the contract and thus deprive the defendant fund of money, or would it fashion a new rule that only pension funds can interpose illegality defenses in contract enforcement actions brought by pension funds? *Cf. Federated Department Stores, Inc. v. Moitie*, No. 79-1517, slip op. at 7 (S.Ct. June 15, 1981).

[39] That is precisely what happened in this case: The union and Respondents abandoned prior lawful clauses (C.A.J.A. 477-78, 570); disregarded other, more straightforward means of funding the funds (C.A.J.A. 27-28); and, in order to serve other ends, insisted upon the purchase-of-coal penalty clause, which they knew to be of dubious legality (C.A.J.A. 28; *see* p. 5, *supra*).

decisions of this Court and raises a serious constitutional question.

A. A Court Always Has the Power To Decide Whether a Contract Clause It Is Asked To Enforce Violates the Law.

The Court of Appeals thought that the issue in this case was whether it should "add the remedy of contract avoidance to the other forms of relief which the statute expressly provides" [60] and held that it did not have jurisdiction to create such an additional remedy. But that is not the issue. This case concerns defenses, not remedies, and the difference is crucial.

It has long been clear that a party may raise as a defense matters that it may not assert as an affirmative claim for relief. Indeed, it has repeatedly been held that a court that is without jurisdiction to decide an issue raised directly by a plaintiff may nevertheless decide the same issue when it is raised as a defense in a suit over which the court does have jurisdiction.[61] Thus, as this Court has recognized, a court may decide the merits of a defendant's claim that a contract the court is called upon to enforce violates federal law even if that question would normally lie within the exclusive jurisdiction of

---

[60] 642 F.2d at 1314; Pet. App. 22a.

[61] *E.g., De Magno v. United States*, 636 F.2d 714 (D.C. Cir. 1980). For example, a defendant may raise defensively, to defeat a plaintiff's action, a claim that would be barred by the statute of limitations if asserted affirmatively (*see, e.g., Bull v. United States*, 295 U.S. 247 (1935)); a claim that would not satisfy the requisite jurisdictional amount if asserted affirmatively (*see, e.g., Lenz v. Wagner*, 240 F.2d 666 (5th Cir. 1957)); a claim against the government that would be barred by sovereign immunity if asserted affirmatively (*see, e.g., United States v. Pusey*, 47 F.2d 22 (9th Cir. 1931); *Burgess v. M/V Tamano*, 382 F. Supp. 351 (D. Me. 1974), *aff'd*, 559 F.2d 1200 (1st Cir. 1977)); and a claim that would normally lie within the exclusive jurisdiction of another forum if asserted offensively in an independent action for relief (*see, e.g., Hampton House Management Corp. v. Saleh*, 357 F. Supp. 591 (S.D.N.Y. 1973); *cf. United States v. Grand Trunk Western R. Co.*, 50 Ad. L.2d (P&F) 267 (W.D. Mich. Jan. 28, 1981)).

another forum. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 635-36 n.6 (1977).[62]

In this case, it is Respondents who are seeking affirmative relief. They brought the action. They chose the forum. They chose the time to sue. And they asked the court for assistance in the nature of specific performance. The issue in this case is thus whether Respondents are entitled to the remedy they seek. Had the Court of Appeals kept this in mind, it would have understood that it could not grant Respondents specific enforcement of the purchase-of-coal clause without first deciding whether the clause violated Section 8(e)—whether, in other words, it created any valid, legal obligations.

Kaiser Steel, on the other hand, is not a claimant seeking a remedy for a violation of federal law. It did not initiate this lawsuit or invoke the court's jurisdiction. It seeks only to demonstrate, by way of defense, that Respondents are not entitled to the remedy they seek. Whatever may be the exclusive jurisdiction of the NLRB to grant remedies to claimants—like Respondents here—who initiate litigation, it does not preclude a federal court from deciding whether a contract clause it is asked to enforce violates federal law.

A contract provision like the purchase-of-coal clause that violates federal law "creates no right of action which a court of justice will enforce." [63] A federal court

---

[62] *Accord, Big Top Stores, Inc. v. Ardsley Toy Shoppe, Ltd.*, 64 Misc. 2d 894, 315 N.Y.S.2d 897 (Sup. Ct. 1970), *aff'd*, 36 A.2d 582, 318 N.Y.S.2d 924 (App. Div. 1971) (defense of illegality under the Sherman Act); *Shareholders Management Co. v. Gregory*, 449 F.2d 326 (9th Cir. 1971) (defense of illegality under the Securities Exchange Act of 1934).

[63] *Miller v. Ammon*, 145 U.S. 421, 427 (1892). *See also Boatland, Inc. v. Brunswick Corp.*, 558 F.2d 818, 823 (6th Cir. 1977) (an illegal contract clause is "nugatory and without legal effect"); *Cecil B. DeMille Productions v. Woolery*, 61 F.2d 45, 49 (9th Cir. 1932) (a contract provision that is prohibited by law has "no legal existence"); *Laborers' Int'l Union Local 107 v. Kunco, Inc.* 344 F. Supp. 626, 630 (W.D. Ark. 1972) ("no cause of action for alleged breach" of a contract clause that violates federal law "can be maintained"), *rev'd on other grounds*, 472 F.2d 456 (8th Cir. 1973).

thus can always decide whether a contract clause it is called upon to enforce violates federal law. The illegality defense must be resolved in order to determine whether the plaintiff who seeks to enforce the clause is entitled to the remedy it seeks. The court's task in such a case has nothing to do with creating a remedy for the defendant.

In *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11 (1979), this Court recognized that entertaining a defense is not the same as creating a remedy. As the Court said, regardless whether a statute declaring certain types of contracts "void" creates a private cause of action for relief from such a contract, "[*a*]*t the very least*" the statute "could be raised *defensively* in private litigation *to preclude the enforcement of* . . . [the] contract." [64]

Indeed, where, as here, a party has asked the court to use its equitable powers to enforce a contract, the court has not only the power, but a duty first to determine whether that contract violates federal law and is thus unenforceable. As this Court put it in *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948):

> "The power of the federal courts to enforce the terms of private agreements is *at all times* exercised subject to the restrictions and limitations of the public policy of the United States as manifested in . . . federal statutes. . . . Where the enforce-

---

[64] *Id.* at 18 (emphasis added). The two cases cited by the Court of Appeals (642 F.2d at 1314; Pet. App. 22a) for the proposition that contracts declared by statute to be "void" nevertheless may be enforced are not to the contrary. *Mills v. Auto-Lite Co.*, 396 U.S. 375 (1970), did not involve a question of contract enforcement, for the contract in that case had been fully executed by all parties. *Mills* raised the very different question whether a party to an agreement is entitled, after execution, to "retrospective relief" in the nature of rescission. *Id.* at 386. In *Occidental Life Ins. Co. v. Pat Ryan & Assoc.*, 496 F.2d 1255, 1266-67 (4th Cir.), *cert. denied*, 419 U.S. 1023 (1974), the court held only that the securities laws do not require the nonenforcement of a legal contract on account of the illegality of collateral matters.

ment of private agreements would be violative of that policy, *it is the obligation of courts to refrain from such exertions of judicial power.*" (Emphasis added; footnote omitted.)[65]

B. The LMRA Authorizes Federal Courts To Decide Whether Contract Clauses They Are Asked To Enforce Violate Section 8(e).

Congress did not intend, in enacting Section 8(e) of the LMRA, to create a special exception to the rule that courts do not enforce contracts that violate the law. To the contrary, it is clear from the plain language and legislative history of the statute, and from an analysis of the NLRB exclusive jurisdiction doctrine itself, that courts have jurisdiction to determine whether contract clauses they are asked to enforce violate Section 8(e). Any other construction of the LMRA would raise serious constitutional problems.

1. Hot Cargo Clauses May Not Be Enforced Because Section 8(e) Provides That All Such Clauses Are "Unenforcible and Void."

Section 8(e) provides that "it shall be an unfair labor practice" to enter into an agreement containing a hot cargo clause. 29 U.S.C. § 158(e). But in a separate, independent clause, Section 8(e) also states that "any contract or agreement entered into heretofore or hereafter containing such [a hot cargo clause] shall be to such extent unenforcible and void." *Id.* By its literal terms, Section 8(e) is thus an unqualified and unmistakable statutory command that hot cargo clauses are void at their inception and are at all times unenforceable by the federal courts.

The Court of Appeals recognized that it could not disregard the "unenforcible and void" clause in Section

---

[65] *See also Nyhus v. Travel Management Corp.*, 466 F.2d 440, 447 (D.C. Cir. 1972) ("Invalidity of a contract offensive to public policy . . . is a barrier 'which the court itself [is] bound to raise in the interests . . . of justice' "); *Nathan v. Tenna Corp.*, 560 F.2d 761, 763 (7th Cir. 1977).

8(e), but it avoided a literal reading of the language and gave it instead a much narrower, and less straightforward, construction. According to the Court of Appeals, the "unenforcible and void" language means only that a union may not obtain specific performance of an agreement by an employer not to do business with a third-party supplier.[66]

The court made two errors. First, the court overlooked the primary purpose of Section 8(e), which, as noted, is to protect neutral employers like Kaiser Steel, not boycotted third parties.[67] It makes no sense to construe the most explicit and powerful part of Section 8(e) to protect only parties whose interests were not of primary concern to Congress.

Second, the Court of Appeals' interpretation of the statute finds no support in its language or legislative history. The language of the statute is unqualified, and the legislative history makes clear that Congress intended both to make the act of entering into a hot cargo clause an unfair labor practice and to make all such hot cargo clauses unenforceable.[68]

---

[66] 642 F.2d at 1314; Pet. App. 22a. The court actually said that it construed the language to prevent unions "from obtaining specific performance of a 'hot cargo' clause . . . ." 642 F.2d at 1315; Pet. App. 23a. Since Respondents in this case sought, and obtained from the lower courts, specific performance of the hot cargo clause here at issue, the court's stated principle would compel a result different from that which it reached. Presumably, therefore, the court meant that the "unenforcible and void" language was intended to prohibit specific performance of actual refusals to deal, not all forms of specific performance of illegal hot cargo clauses.

[67] *See* pp. 15-16, *supra*.

[68] The original bill passed by the Senate made it an unfair labor practice for a union and a common carrier to enter into a hot cargo agreement and provided that all such hot cargo agreements are "unenforcible and void." National Labor Relations Board, 2 Legislative History of Labor-Management Reporting and Disclosure Act of 1959 ("Legis. Hist.") at 1258 (1959) (remarks of Senator Kennedy); *see also* remarks of Senator Goldwater (the bill "makes unenforcible and unlawful any 'hot cargo' agreement between a

Nothing in the history of the statute suggests that courts may enforce illegal hot cargo clauses or that only contract clauses that the NLRB has previously found to be illegal are unenforceable and void. Nor is there any indication that Congress intended the "unenforcible and void" language to have only the narrow meaning attributed to it by the Court of Appeals, that Congress intended employers to comply with or courts to enforce illegal hot cargo clauses under any circumstances, or that Congress intended to withhold from the federal courts the power to determine the legality of contract clauses they are called upon to enforce.[69]

---

union and a common carrier"), *id.* at 1290. The later House version prohibited all hot cargo agreements, not just those in the common carrier industry, and provided that "[a]ll such agreements are void and unenforcible." *Id.* at 1361; *see also* remarks of Senator Goldwater, *id.* at 1437. Congressman Griffin, the sponsor of the House bill after whom the statute was named, described a provision in the House bill that became Section 8(e) as follows:

> "Subsection (b) of Section 705 *not only* makes it *an unfair labor practice* to enter into a 'hot cargo' agreement, *but also* makes it clear that such contracts are *void and unenforcible.*" *Id.* at 1523 (emphasis added).

See also remarks of Congressman Rhodes, *id.* at 1581 ("not only . . . an unfair labor practice . . . but also . . . void and unenforceable").

The language that became Section 8(e) as enacted was subsequently drafted in the Senate and was intended to embody the House position. *Id.* at 1383. Congressman Cramer described Section 8(e) as follows:

> "This section makes an unfair labor practice and declares unenforceable and void a collective agreement [that includes an illegal hot cargo clause.] * * * What the wording clearly does is to describe as an unfair labor practice a hot cargo contract between an employer and a labor organization and then pronounce it unenforcible and void." *Id.* at 1619-20.

See also 1 Legis. Hist. at 943 (Conference Report).

[69] On the Court of Appeals' theory, a party seeking to enforce a hot cargo clause, not only would be entitled to specific performance of the clause under some circumstances, but also would, under all circumstances, be entitled to damages for a party's past refusal to participate in an illegal boycott. The prospect of such damage

To the contrary, as Senator Goldwater, one of the bill's sponsors, explained after the enactment of Section 8(e), the statute renders hot cargo clauses "unenforcible and void for all purposes." He added:

> "This means that *such contractual clauses are per se illegal.* It is unlawful for *either party* even to execute such an agreement, . . . *to compel the other party to enter into it or live up to it even if his refusal to do so is in breach* of a voluntary agreement to abide by the agreement, and finally, *such breach does not constitute a good cause of action in a suit of law to recover damages* for the breach or to secure specific performance of the agreement." [70]

Prior decisions of this Court confirm that the illegality of a hot cargo clause can be raised defensively in private litigation to bar the enforcement of such a clause. In *National Woodwork Manufacturers Association v. NLRB*, *supra*, the Court explained that Section 8(e) was added to the LMRA to close a "loophole" in the law by eliminating "situation[s] in which [hot cargo] clauses might be employed to exert subtle pressures upon employers to engage in 'voluntary' boycotts" and preventing *"the possibility of damage actions against employers for breaches of 'hot cargo' clauses."* 386 U.S. at 634 (emphasis added). It is precisely this loophole of damage ac-

---

actions would do much to encourage illegal hot cargo boycotts, and courts would be lending their aid to such boycotts by awarding damages no less than if they ordered specific performance of the refusal to deal itself. *See Danielson v. International Organization of Masters, Mates and Pilots*, 521 F.2d 747, 753-54 n.7 (2d Cir. 1975) (because "Section 8(e) prohibits hot cargo agreements whether 'express or implied,'" a "complete cessation of business with another person is not necessary to come within the prohibition"; where an agreement permits such business "only under extremely onerous conditions, [such as] the payment of damages, the agreement 'impliedly' prohibits the 'doing of business with another person.'"). *See also* pp. 20-21 & n.36, *supra*.

[70] 2 Legis. Hist. at 1857 (emphasis added); *id.* at 1829 ("You can't strike to compel an employer to live up to [a hot cargo clause] and you can't take it into a court and sue for breach of contract."). *See also* remarks of Representative Kearns, *id.* at 1861.

tions to enforce illegal hot cargo clauses that the Court of Appeals' opinion here would reopen.[71]

More recently, in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 628 (1975), this Court reiterated that Section 8(e) was designed "to plug technical loopholes" by proscribing "contractual agreements to achieve economic coercion prohibited by § 8(b)(4)." As Justice Stewart said, in a passage with which no Justice disagreed:

> "[T]he signatory of a purely voluntary agreement that violates § 8(e) is fully protected from any damage that might result from the illegal 'hot cargo' agreement by *his ability simply to ignore the contract provision that violates § 8(e)* . . . . Since § 8(e) provides that any prohibited agreement is 'unenforcible and void,' *any union effort to invoke legal processes to compel the neutral employer to comply with his purely voluntary agreement would obviously be unavailing.*" 421 U.S. at 649-50 n.9 (emphasis added) (dissenting opinion).[72]

While they are not unanimous, the lower courts also have recognized that illegal hot cargo clauses may not

---

[71] *See also Danielson v. International Organization of Masters, Mates and Pilots*, 521 F.2d 747, 753 (2d Cir. 1975); *McLeod v. American Federation of Television and Radio Artists*, 234 F. Supp. 832, 841 (S.D.N.Y. 1964) (illegal hot cargo provision is "void and unenforceable as of the time of its insertion into the contract and, *ipso facto*, cannot be the basis of any breach of the collective bargaining agreement"), *aff'd per curiam*, 351 F.2d 310 (2d Cir. 1965).

[72] In *Connell*, the majority found "no legislative history in the 1959 Congress suggesting that labor-law remedies for § 8(e) violations were intended to be exclusive," and it concluded that an illegal hot cargo agreement therefore could give rise to liability under the Sherman Act. 421 U.S. at 634. The dissenting Justices, recognizing the distinction between remedies and defenses that eluded the Court of Appeals in this case, concluded both that Congress "restrict[ed] the remedies for violations of § 8(e) itself to those available from the Board" (*id.* at 650) and that employers could safely ignore illegal hot cargo clauses because such clauses could not be judicially enforced.

be enforced.[73] The Second Circuit, for example, has twice held that a federal court has jurisdiction to determine whether a contract violated Section 8(e) and was thus unenforceable, even though the party asserting its illegality had not taken its complaint to the NLRB.[74] The Third Circuit also has made clear that the illegality of the purchase-of-coal clause could be raised as a defense to a lawsuit to enforce that very clause.[75] And the Tenth Circuit recently remanded for further factual proceedings a district court decision that a provision in a collective bargaining agreement violated Section 8(e); the court did not question the power of the district court to decide the

---

[73] One other circuit court agrees with the Court of Appeals in this case. In *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979), the Ninth Circuit ruled that the NLRB's primary jurisdiction precludes federal courts from acting as the initial arbiters of unfair labor practice charges in actions brought under Section 301.

[74] *United Optical Workers Local 708 v. Sterling Optical Co.*, 500 F.2d 220 (2d Cir. 1974); *Todd Shipyards Corp. v. Industrial Union of Marine and Shipbuilding Workers Local 39*, 344 F.2d 107 (2d Cir. 1965). *See also Carrier Air Conditioning Co. v. NLRB*, 547 F.2d 1178, 1191 n.15 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977) ("resort to the courts to enforce a provision invalid under § 8(e) will almost always be futile, given the section's declaration that such provisions are unenforcible [sic] and void."); *Botany Indus., Inc. v. Amalgamated Clothing Workers*, 375 F. Supp. 485 (S.D.N.Y.), *vacated as moot*, 506 F.2d 1246 (2d Cir. 1974) (court had jurisdiction to hear Section 8(e) defense to union's Section 301 suit to enforce an arbitrator's award directing employer to comply with alleged hot cargo clause).

[75] *Lewis v. Seanor Coal Co.*, 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968). *See also Pittsburgh Die Sinkers Lodge No. 50 v. Pittsburgh Forgings Co.*, 255 F. Supp. 142, 146 (W.D. Pa. 1966) (an action does not lie to enforce a hot cargo provision because Section 8(e) of the LMRA "makes such restrictive agreements void"). In *Huge v. Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979), the Third Circuit stated that a federal court may not initially decide an issue of labor law illegality. But, as noted (*supra* at n.19), it was not argued in *Huge* that the contract provision there sought to be enforced was itself unlawful; the employer in that case was in effect seeking a labor law remedy for the alleged illegality of a wholly separate contract provision and events outside the contract.

Section 8(e) issue, even though the employer challenging the agreement had not taken his grievance to the NLRB.[76]

The Court of Appeals' decision below requiring Kaiser Steel to comply with a hot cargo clause that Congress has outlawed does not square with the plain language or the legislative history of the statute or with this Court's decisions in *National Woodwork* and *Connell*. This suit is precisely the kind of enforcement action that Section 8(e) proscribes.

2. *In Any Event, Federal Courts Have Jurisdiction To Decide Labor Law Issues in Cases Properly Before Them on Other Grounds.*

The Court of Appeals' decision not only misconstrues Section 8(e) itself, but also runs afoul of a more general principle, manifest in a long line of decisions, that the doctrine of primary NLRB jurisdiction does not prevent a federal court from deciding labor law issues that arise in actions, like this one, "brought under independent federal remedies." *Connell Construction Co. v. Plumbers & Steamfitters Local 100, supra*, 421 U.S. at 626 (footnote omitted).[77] Indeed, in *Connell* the Supreme Court—far from deferring to any exclusive NLRB jurisdiction—decided in the first instance the very issue that the Court of Appeals here said federal courts may not consider: whether a contract clause violates Section 8(e).[78]

---

[76] *Frito-Lay, Inc. v. Retail Clerks Local 7*, 629 F.2d 653 (10th Cir. 1980).

[77] *See also Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965).

[78] In *Connell*, an employer filed suit against a union challenging a contract between them under the Sherman Act. The employer could have, but did not, file a complaint with the NLRB claiming that the contract violated Section 8(e). Nevertheless, in order to decide whether the contract violated the Sherman Act, the Court had to determine whether the clause comported with Section 8(e) and was therefore immune from antitrust scrutiny. The Supreme Court decided that question and held that the clause violated Section 8(e) and thus was not immune from scrutiny under the Sherman Act. 421 U.S. at 626, 634.

Had Kaiser Steel sought a declaratory judgment that the purchase-of-coal clause violates the Sherman Act, as the Court of

In other cases, too, this Court has repeatedly made clear that the exclusive jurisdiction doctrine is inapplicable to a case, like this case, that was brought under Section 301 of the LMRA. In *Vaca v. Sipes*, 386 U.S. 171 (1967), for example, the Court said that the doctrine of exclusive NLRB jurisdiction has "no application to § 301 suits." [79] Similarly, in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 245 n.5 (1962), the Court held that the exclusive jurisdiction doctrine "is inapplicable" to suits brought under Section 301; and in *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 101 n.9 (1962), it held that the exclusive jurisdiction doctrine "is not relevant" to "a suit for violation of a collective bargaining contract." [80]

The lower courts, too, have recognized that federal courts have jurisdiction to decide labor law issues that arise in contract enforcement actions otherwise properly before them. As noted, the majority of the courts that have faced the issue have held that federal courts have jurisdiction to decide issues under Section 8(e) that

---

Appeals said it should have done, then under *Connell*, the court would have had to do precisely what the Court of Appeals in this case said it had no power to do: examine in the first instance the legality of the purchase-of-coal clause under the LMRA in order to decide whether the clause is immune from antitrust scrutiny.

[79] 386 U.S. at 184. In *Vaca*, a discharged employee sued his union for breach of its duty of fair representation. The Court held that, even though the alleged breach constituted an unfair labor practice, "the jurisdiction of the courts" is not "destroyed by the fact that the employee . . . finds it necessary *to prove an unfair labor practice by the union* . . . ." *Id.* at 186 (emphasis added).

[80] *See also Motor Coach Employees v. Lockridge*, 403 U.S. 274, 300 (1971). The legislative history of Section 301 of the LMRA makes clear the congressional intent that, "[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." Conf. Rep. No. 510 on H.R. 3020, 89th Cong., 1st Sess. 42 (1947). *See United Ass'n of Journeymen & Apprentices v. Local 334*, No. 80-710, slip op. at 12 (S. Ct. June 22, 1981); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 513 (1962).

arise in cases properly before them on other grounds.[81] The lower courts have reached the same result in connection with other labor law issues. The Second Circuit, for example, recently held that a federal court may decide whether a contract clause violates Sections 8(a)(3) and 8(b)(2) of the LMRA in an action brought to enforce an arbitration award, even though the NLRB had never been asked to find the clause illegal.[82] The First Circuit has affirmed a district court's refusal to enforce a union security and arbitration clause in a collective bargaining agreement on the ground that enforcement would involve a violation of Section 8(a) of the LMRA.[83] And in another case, it observed:

> "If a complaint under § 301 is predicated upon the breach of a term of a collective bargaining agreement which the Congress has forbidden to be included in such an agreement, the federal court must necessarily hold such term invalid, and deny recovery thereon, . . ." [84]

The lesson of these cases is that federal courts may decide labor law questions when they arise as a collateral matter in actions otherwise properly before the courts and may, in particular, decide whether contract clauses they are asked to enforce violate Section 8(e). Otherwise, the courts would be unable fully to resolve cases properly before them.

Federal court jurisdiction over the Section 8(e) issue in cases like this not only is necessary to enable the lower courts fully to resolve contract enforcement actions before them, but also will not undermine any of the in-

---

[81] *See* pp. 39-41, *supra*.

[82] *Perma-Line Corp. v. Sign Pictorial & Display Local 230*, 639 F.2d 890 (2d Cir. 1981).

[83] *Local 1898, IAM v. Brake and Elec. Sales Corp.*, 297 F.2d 590 (1st Cir. 1960).

[84] *International Bhd. of Teamsters Local 25 v. W. L. Mead, Inc.*, 230 F.2d 576, 581 (1st Cir.), *dismissed per stipulation*, 352 U.S. 802 (1956).

terests on which the NLRB exclusive jurisdiction doctrine is based. Federal courts are "not without experience" [85] in determining whether contract clauses violate Section 8(e). Indeed, the central question raised by the Section 8(e) defense in this case—whether the boycott that the purchase-of-coal clause was intended to induce serves union objectives outside the employer's work unit—is identical to that which federal courts are empowered to decide under Sections 8(b)(4)(B) and 303 of the LMRA, 29 U.S.C. §§ 158(b)(4)(B) and 187.[86] Thus, "it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." [87]

3. *As Construed by the Court of Appeals, the LMRA Would Unconstitutionally Intrude Upon the Ability of Federal Courts To Decide Contract Enforcement Actions.*

The Court of Appeals' construction of Section 8(e) raises a serious constitutional question. As construed by the Court of Appeals, the LMRA unconstitutionally intrudes upon the federal courts' ability to decide contract enforcement actions over which Congress gave them jurisdiction and thus offends the constitutional requirement of the separation of powers. This constitutional problem further demonstrates that the Court of Appeals' construction of the LMRA is erroneous.

The parties and the lower courts in this case agree that the district court had jurisdiction to entertain

---

[85] *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 686 (1965).

[86] Section 8(b)(4)(B) provides—in language virtually identical to that used in Section 8(e)—that it shall be an unfair labor practice for a union to induce an employer to cease doing business with any other person. 29 U.S.C. § 158(b)(4)(B). Federal courts are expressly empowered under Section 303 of the LMRA, 29 U.S.C. § 187, to hear suits for damages brought by anyone alleging injury from a violation of Section 8(b)(4)(B), regardless whether the NLRB has previously had an opportunity to resolve the dispute.

[87] *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 297-98 (1971). *See also Farmer v. United Bhd. of Carpenters & Joiners Local 25*, 430 U.S. 290, 297 (1977).

Respondents' action under Section 301 of the LMRA. That section vests in the district courts jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization . . . ." 29 U.S.C. § 185, According to the Court of Appeals, however, a federal court may determine in a Section 301 action only "what a particular contract provision means and whether its obligations have been fulfilled"; whether the contract clause violates Section 8(e), the Court said, is for the NLRB to decide.[88]

But the NLRB is under no obligation to examine a contract provision that is alleged to violate Section 8(e), even on request of a party to the contract like Kaiser Steel. Indeed, as the Court of Appeals recognized, a decision by the general counsel of the NLRB not to commence an enforcement proceeding in response to an employer's complaint challenging the lawfulness of a hot cargo clause is not reviewable by any court.[89]

Thus, by holding that a federal court may not determine the lawfulness of a contract clause under Section 8(e) in an enforcement action under Section 301, the court has left employers like Kaiser Steel with the prospect that they may be compelled to comply with a contract clause the lawfulness of which *no court* has been able to review. The Court of Appeals' decision also means that a federal court must, pursuant to Section 301 of the LMRA, enforce an illegal hot cargo clause even though *neither it nor any other court* has ever been able to pass on the lawfulness of the clause.

Construing the LMRA in this way, both to empower the federal courts to enforce collective bargaining agreements and to deny them the power to determine the legality of the agreements they are called upon to enforce, raises a serious constitutional question. That question has not, to be sure, been the subject of widespread

---

[88] 642 F.2d. at 1315; Pet. App. 23a-24a.

[89] 642 F.2d at 1318; Pet. App. 31a. *See, e.g., Vaca v. Sipes, supra,* 386 U.S. at 182.

litigation. But it has been clear for over a hundred years that Congress may not grant a federal court jurisdiction to decide a case and then tell it how to decide,[90] and Article III of the Constitution has long been understood to prohibit statutes that withdraw controlling questions of law from federal enforcement courts.[91]

The Court of Appeals' construction of the LMRA runs afoul of these principles and renders the statute unconstitutional.[92] In the absence of a compelling showing in the LMRA or its legislative history that Congress

---

[90] *E.g., United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

[91] *See, e.g., De Magno v. United States*, 636 F.2d 714, 725 (D.C. Cir. 1980) (to permit an agency "to enlist the coercive power of the courts to enforce a money judgment against an individual without the basis of the . . . claim ever being subject to judicial scrutiny . . . is contrary to the very notion of an ordered government of checks and balances"); *United States v. Howard*, 440 F. Supp. 1106 (D. Md. 1977), *aff'd on other grounds*, 590 F.2d 564 (4th Cir.), *cert. denied*, 440 U.S. 976 (1979). *Cf. Bob Jones Univ. v. Simon*, 416 U.S. 725, 746 (1974).

As Professor Hart put it in his famous "Dialogue":

> "Name me a single Supreme Court case that has squarely held that, in a civil enforcement proceeding, questions of law can be validly withdrawn from the consideration of the enforcement court where no adequate opportunity to have them determined by a court has been previously accorded. When you do, I'm going back to re-think *Marbury v. Madison*."

Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1378-79 (1953), *reprinted in* H. Hart and H. Wechsler, The Federal Courts and the Federal System 341 (2d ed. 1973) (footnote omitted).

[92] At the very least, the Court of Appeals' construction presents a substantial constitutional question. Professor Van Alstyne has described that question as follows:

> "If Congress may not instruct the Supreme Court on how to decide a case or controversy or on what results to reach or what decision to make, then it is arguable that legislation that permits a case to be brought to the Court but prunes away only certain kinds of issues may have the effect of mandating the outcome of the case. . . . It is arguable therefore that even assuming Congress may restrict the appellate jurisdiction of

intended to bar a court from considering the legality of contracts it is called upon to enforce, the statute should not be read to produce that result.[93]

III. THE COURT OF APPEALS ERRED IN AWARDING ATTORNEYS' FEES BECAUSE NO APPLICABLE STATUTE PROVIDES FOR SUCH AN AWARD.

Since this Court's decision in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975), it has been clear that federal courts may not award attorneys' fees unless authorized to do so by statute. The courts below, however, failed to heed *Alyeska* and awarded attorneys' fees even though no applicable statute provides for such an award.

Respondents' complaint alleged a single cause of action—failure by Kaiser Steel to comply with the 1974 collective bargaining agreement—and properly claimed jurisdiction under Section 301 of the LMRA. That section provides jurisdiction in actions brought to enforce collective bargaining agreements. It does not, however, authorize an award of attorneys' fees.[94]

---

the Supreme Court it may not do so on the basis of merely selecting certain kinds of issues to withdraw from consideration rather than acting to withdraw whole cases. . . . [T]o the extent the case is permitted to be heard by the Court but [the Court] is forbidden to decide it on the basis of certain things it produces the net effect of directing the outcome of the case or controversy itself, and in my mind at least it raises a substantial question about the separation of powers . . . ." Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 90th Cong., 2d Sess. 173 (1968).

[93] *See, e.g., NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available"); *Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974) (statutory construction "should go in the direction of constitutional policy"), *quoting United States v. Johnson*, 323 U.S. 273, 276 (1944).

[94] *E.g., General Tel. Co. v. International Bhd. of Elec. Workers Local 89*, 554 F.2d 985, 987 (9th Cir. 1977); *National Ass'n of Letter Carriers v. United States Postal Serv.*, 590 F.2d 1171, 1176 & n.5 (D.C. Cir. 1978); *Western Elec. Co. v. Communi-*

Respondents also claimed jurisdiction under Section 502 of ERISA, 29 U.S.C. § 1132 (1976). But, while Section 502(g) does give federal courts jurisdiction to award attorneys' fees in actions arising under ERISA, this is not such an action.[95]

Section 502 provides jurisdiction only over actions brought to enforce either ERISA itself or the provisions of a pension plan.[96] But this action was brought only to enforce a collective bargaining agreement.

Respondents did not allege that Kaiser Steel violated the terms of a pension plan. Indeed, Respondents did not even put any such plan in the record. None of the plans administered by Respondents imposes any obligations on Kaiser Steel, so Respondents' suit against Kaiser Steel could not in any event have been based on a violation of a plan or brought to enforce a plan.[97]

Nor did Respondents allege that Kaiser Steel had violated any provision of ERISA itself. Until it was

---

cation Equip. Workers, Inc., 554 F.2d 135, 138 (4th Cir. 1977); *International Bhd. of Elec. Workers Local 12 v. A-1 Elec. Serv. Inc.*, 535 F.2d 1 (10th Cir. 1976), *cert. denied*, 429 U.S. 832 (1976).

[95] A new subsection was added to Section 502 of ERISA by Section 306(b)(1) of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, which became effective on September 26, 1980, after the Court of Appeals' decision in this case. This new subsection also provides for attorneys' fees; but, like Section 502(g), which is now Section 502(g)(1), the new subsection applies only to actions brought to enforce ERISA. Thus, the new subsection too could apply to this case only if the cause of action in this case arose under ERISA.

[96] *See* Section 502(a)(3), 29 U.S.C. § 1132(a)(3).

[97] Neither of the lower courts analyzed the applicable statutes or set forth any basis for the attorneys' fee award. *See* 642 F.2d at 1320; Pet. App. 33a-34a, 69a. (For this reason alone, the award should be reversed. *See, e.g., Iron Workers Local 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980).) The Court of Appeals did cite several earlier cases brought to collect payments owed to pension funds (642 F.2d at 1320; Pet. App. A 34a), but it is not clear from those cases what the plans at issue provided. In any event, whatever may be the case in other plans or other industries, it is clear that the plans at issue here impose no obligations on Kaiser Steel and that this case was not brought to enforce any plan.

amended after the Court of Appeals' decision, ERISA did not require employers to make contributions to pension funds pursuant to collective bargaining agreements. No provision of ERISA was concerned with obligations of employers under such agreements.

Section 306(a) of the ERISA amendments provides a new cause of action, which became law after the Court of Appeals' decision in this case, to enforce obligations of employers to make pension fund contributions pursuant to collective bargaining agreements. 29 U.S.C. § 1145 (1981). And ERISA provides that courts may award attorneys' fees in actions arising under that new section, as well as under the other provisions of ERISA. *See* 29 U.S.C. §§ 1132(g)(1) and (2).

Respondents have argued that they are entitled to attorneys' fees as if this action had been brought under the new statute,[98] but that is not the case. Section 306(a) creates a "new statutory duty."[99] Courts do not give retroactive application to, and create liability for, new statutory duties that are established nearly three years after the conduct in question.[100] The new statute, far from aiding Respondents, proves instead that the applicable provisions of ERISA did not provide any basis for Respondents' action and, thus, that there is no basis for the award of attorneys' fees.[101]

---

[98] Brief for Respondents in Opposition to Petition for a Writ of Certiorari, April 13, 1981, at 26.

[99] 124 Cong. Rec. 56588 (daily ed., May 1, 1978) (remarks of Senator Williams).

[100] This is especially true if, as Respondents argue is the case with Section 306(a), the new statute effects a substantial change in the requirements of the law. *See, e.g., Greene v. United States*, 376 U.S. 149, 160 (1964); *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913); *see also Bradley v. Richmond School Board*, 416 U.S. 696, 721 (1974).

[101] *See* 1A Sutherland Statutes and Statutory Construction 178 (C. Sands ed. 1972) (it can be inferred from the enactment of a new amendment that its requirements were not included in the original act and that Congress "intended to change the original act by creating a new right").

CONCLUSION

For the foregoing reasons, the Court of Appeals' decision should be reversed, and the case should be remanded for further proceedings to determine whether the purchase-of-coal clause is illegal.

Respectfully submitted,

ROBERT A. HAMMOND, III
A. DOUGLAS MELAMED *
LYNN BREGMAN
JOSEPH A. GRUNDFEST
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Petitioner
Kaiser Steel Corporation

Of Counsel:
RICHARD GARY
General Counsel
Kaiser Steel Corporation
300 Lakeside Drive
Oakland, California 94666

July 8, 1981

* *Counsel of Record*

Office-Supreme Court, U.S.
FILED
AUG 31 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION,
Petitioner,
v.
JULIUS MULLINS ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS

STEPHEN J. POLLAK *
RALPH J. MOORE, JR.
WENDY S. WHITE
JEFFREY C. MARTIN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

E. CALVIN GOLUMBIC
WALTER P. O'CONNELL
United Mine Workers of America Health and Retirement Funds
2021 K Street, N.W.
Washington, D.C. 20006
(202) 452-5000

Counsel for Respondents Julius Mullins et al.

* Counsel of Record

Of Counsel:
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036

August 31, 1981

QUESTIONS PRESENTED

1. Whether, in a suit by trustees of an employee health and retirement trust fund to collect employer contributions to the fund required by a collective bargaining agreement, the courts below properly declined to entertain antitrust and unfair labor practice defenses to the agreement which were raised by the employer after all employee services had been performed?

2. Whether § 306(a) of the Multiemployer Pension Plan Amendments Act of 1980, enacted after the Court of Appeals rendered its judgment, requires affirmance of that judgment?

3. Whether the courts below properly held that the trustees of an employee health and retirement trust fund were entitled to reasonable attorneys' fees where they had recovered delinquent contributions from an employer-contributor in a suit brought pursuant to ERISA? *

---

* Kaiser did not contest the Trustees' claim for attorneys' fees when the Trustees moved for summary judgment in the District Court. (J.A. 66.) Accordingly, while respondents brief the question, pp. 48-50, *infra*, we submit that it should not be considered. *Cf. Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2, 157 n.16 (1970).

TABLE OF CONTENTS

	Page
STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
A. The Facts	2
1. The 1974 Coal Wage Agreement	2
2. Kaiser's Coal Purchases and Reports to the Trustees	4
B. Decisions Below	5
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. THE COURT OF APPEALS' REFUSAL TO ENTERTAIN KAISER'S DEFENSE THAT THE PURCHASE-OF-COAL CLAUSE IS UNLAWFUL WAS A PROPER APPLICATION OF THE PRINCIPLES OF THIS COURT'S DECISION IN *LEWIS* v. *BENEDICT COAL CORPORATION*	9
A. *Benedict* Recognizes that Contractual Obligations of an Employer to Make Contributions to Employee Trust Funds Are Not Subject to Ordinary Contractual Defenses	10
B. The Courts Have Repeatedly Refused to Entertain the Defense that a Collective Bargaining Agreement Requiring Contributions to Employee Trust Funds Is Illegal	11
C. The Court of Appeals' Decision Is Consistent with National Antitrust and Labor Policy	14
II. THE COURT OF APPEALS' REJECTION OF KAISER'S ANTITRUST DEFENSE WAS A CORRECT APPLICATION OF *KELLY* v. *KOSUGA*	15

TABLE OF CONTENTS—Continued

Page

A. *Kelly* Establishes that the Defense of Antitrust Illegality Should Not be Entertained in a Suit to Recover the Contract Price for Delivered Goods or Services 15

B. The Rationale of *Kelly* Applies Here 20

C. Ordering Kaiser to Make Prescribed Contributions to the Funds Is Not Enforcing the Precise Conduct Made Unlawful by the Sherman Act 22

III. THE COURT OF APPEALS CORRECTLY HELD THAT KAISER'S UNFAIR LABOR PRACTICE DEFENSE IS WITHIN THE LABOR BOARD'S EXCLUSIVE JURISDICTION 24

A. The NLRB Exclusive Jurisdiction Doctrine Is Squarely Applicable 24

B. The Language and History of § 8(e) Support Application of the NLRB Exclusive Jurisdiction Doctrine 28

C. Application of the Exclusive Jurisdiction Doctrine to Kaiser's § 8(e) Defense Is Consistent with this Court's Decisions in *Connell* and *Lucas Flour* 33

1. The *Connell* Decision 33

2. The Principle of *Lucas Flour* 35

D. Kaiser's Argument that the Court of Appeals' Construction of § 8(e) Is Unconstitutional Was Not Raised Below and Is Without Merit 36

IV. THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980 REQUIRES AFFIRMANCE OF THE COURT OF APPEALS' JUDGMENT 37

TABLE OF CONTENTS—Continued

Page

A. The Legislative History of § 306(a) Confirms that Employer Claims and Defenses Not Grounded in the Terms of the Agreement Are Barred 39

B. The Endorsement and Disapproval of Specific Judicial Decisions in the Legislative History Confirm that § 306(a) Precludes Kaiser's Antitrust and § 8(e) Defenses 43

C. Under § 306(a), the Only Permissible Illegality Defense Is That Payment Would Violate § 302 of the LMRA 44

D. Section 306(a) Applies to Pending Cases 46

V. THE AWARD OF ATTORNEYS' FEES IS AUTHORIZED BY ERISA 48

CONCLUSION 50

APPENDICES:

A. Sections 502(g), 515, and 4402(e) of the Employee Retirement Income Security Act of 1974, as amended and added by the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1208, 29 U.S.C.A. § 1132(g), 1145, and 1461(e) (West Supp. 1976-80) 1a

B. Section 302 of the Labor-Management Relations Act, as amended, 29 U.S.C. § 186 (1976 & Supp. III, 1979) 4a

TABLE OF AUTHORITIES

Cases: Page

Adickes v. *S. H. Kress & Co.*, 398 U.S. 144 (1970).. 36, 49
Amalgamated Utility Workers v. *Consolidated Edison Co.*, 309 U.S. 261 (1940) 36
Arkla Air Conditioning Co. v. *Famous Supply Co.*, 551 F.2d 125 (6th Cir. 1977) (per curiam) 18
Atchison, Topeka & Santa Fe Railway v. *Local 70, Teamsters*, 511 F.2d 1193 (9th Cir. 1975) (per curiam) 33, 36
Atkinson v. *Sinclair Refining Co.*, 370 U.S. 238 (1962) 35
Barrows v. *Jackson*, 346 U.S. 249 (1953) 19, 20
Bement v. *National Harrow Co.*, 186 U.S. 70 (1902) 21
Boyle v. *North Atlantic Coal Corp.*, 331 F. Supp. 1107 (W.D. Pa. 1971) 12
Bradley v. *Richmond School Board*, 416 U.S. 696 (1974) 46, 47
Bowles v. *Willingham*, 321 U.S. 503 (1944) 37
Bricklayers Union v. *NLRB*, 562 F.2d 775 (D.C. Cir. 1977) 14, 32
Bruce's Juices, Inc. v. *American Can Co.*, 330 U.S. 743 (1947) 16, 21, 22, 23
California v. *Taylor*, 353 U.S. 553 (1957) 36
Carpa, Inc. v. *Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976) 19
Castaneda v. *Dura-Vent Corp.*, 648 F.2d 612 (9th Cir. 1981) 35
Continental Wall Paper Co. v. *Louis Voight & Sons Co.*, 212 U.S. 227 (1909) 16, 20, 22
Connell Construction Co. v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975) 24, 33, 34
Cort v. *Ash*, 422 U.S. 66 (1975) 46
D. R. Wilder Manufacturing Co. v. *Corn Products Refining Co.*, 236 U.S. 165 (1915) 20
District No. 9, International Association of Machinists v. *NLRB*, 315 F.2d 33 (D.C. Cir. 1962), *enf'g* 134 NLRB 1354 (1961) 32

TABLE OF AUTHORITIES—Continued

Page

Eiberger v. *Sony Corp. of America*, 459 F. Supp. 1276 (S.D.N.Y. 1978), *aff'd in part and rev'd in part*, 622 F.2d 1068 (2d Cir. 1980) 19
El Salto, S.A. v. *PSG Co.*, 444 F.2d 477 (9th Cir.), *cert. denied*, 404 U.S. 940 (1971) 18
Farbenfabriken Bayer, A.G. v. *Sterling Drug Inc.*, 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963) 19
Frito-Lay, Inc. v. *Retail Clerks Local 7*, 629 F.2d 653 (10th Cir. 1980) 28
Garner v. *Teamsters Local 776*, 346 U.S. 485 (1953) 7, 24, 25
Goldies, Inc. v. *Alaska Hotel Employees Fund*, 622 P.2d 979 (Alas. 1981) 12
Hawaii v. *Standard Oil Co.*, 405 U.S. 251 (1972) 20
Huge v. *Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979) ..... *passim*
Huge v. *Old Home Manor, Inc.*, 419 F. Supp. 1019 (W.D. Pa. 1976) 49
Kelly v. *Kosuga*, 358 U.S. 516 (1959) ..... *passim*
Kogod v. *Stanley Co. of America*, 186 F.2d 763 (D.C. Cir. 1950) 19
Lewis v. *Benedict Coal Corp.*, 361 U.S. 459 (1960) ..... *passim*
Lewis v. *Harcliff Coal Co.*, 237 F. Supp. 6 (W.D. Pa. 1965) 12
Lewis v. *Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962), *aff'g* 188 F. Supp. 4 (E.D. Ky. 1960) 43
Lewis v. *Seanor Coal Co.*, 256 F. Supp. 456 (W.D. Pa. 1966), *aff'd*, 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968) 12, 28
Local 189, Amalgamated Meat Cutters v. *Jewel Tea Co.*, 381 U.S. 676 (1965) 34
Local 174, Teamsters v. *Lucas Flour Co.*, 369 U.S. 95 (1962) 24, 33, 35
Local 1976, United Brotherhood of Carpenters v. *NLRB (Sand Door)*, 357 U.S. 93 (1958) 29
Los Angeles Mailers Union No. 9 v. *NLRB*, 311 F.2d 121 (D.C. Cir. 1962), *enf'g* 135 NLRB 1132 (1962) 32

TABLE OF AUTHORITIES—Continued

	Page
McMullen v. *Hoffman*, 174 U.S. 639 (1899)	19, 20
Miree v. *DeKalb County*, 433 U.S. 25 (1977)	36
Motor Coach Employees v. *Lockridge*, 403 U.S. 274 (1971)	36
Mullins v. *Reitz Coal Co.*, 105 LRRM 2776 (D.D.C. 1979)	18, 27, 28
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938)	37
NLRB v. *Amax Coal Co.*, 49 U.S.L.W. 4880 (June 29, 1981)	44, 48
NLRB v. *Indiana & Michigan Electric Co.*, 318 U.S. 9 (1943)	34
NLRB v. *International Longshoremen's Association*, 447 U.S. 490 (1980)	34
NLRB v. *Local 103, International Association of Bridge Workers (Higdon)*, 434 U.S. 335 (1978)	13
NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975)	36, 46
National Woodwork Manufacturers Association v. *NLRB*, 386 U.S. 612 (1967)	29, 41
Nedd v. *UMW*, 556 F.2d 190 (3d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978)	49, 50
New Mexico District Council of Carpenters v. *Mayhew Co.*, No. 79-1639 (10th Cir. June 24, 1981)	28, 35
Orange Belt District Council of Painters No. 48 v. *Maloney Specialties, Inc.*, 639 F.2d 487 (9th Cir. 1980)	27, 35, 36
Pennington v. *UMW*, 325 F.2d 804 (6th Cir. 1963), *cert. denied*, 381 U.S. 949 (1965)	12, 18, 36
Perma-Line Corp. of America v. *Sign Pictorial & Display Union, Local 230*, 639 F.2d 890 (2d Cir. 1981)	28
Premier Electrical Construction Co. v. *Miller-Davis Co.*, 291 F. Supp. 295 (N.D. Ill. 1968), *aff'd*, 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970)	19
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974)	29
Revlon, Inc. v. *Williams International, Inc.*, 30 Misc. 2d 772, 214 N.Y.S. 2d 456 (Sup. Ct. 1961)	19

TABLE OF AUTHORITIES—Continued

Page

San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 (1959) 7, 24, 26
Sears, Roebuck & Co. v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978) 27, 34, 35
Simpson v. *United States*, 435 U.S. 6 (1978) 41
Smith v. *Evening News Association*, 371 U.S. 195 (1962) 28, 35
Sunshine Packers, Inc. v. *American Can Co.*, 395 F.2d 86 (5th Cir. 1968) 18
Textile Workers Union v. *Lincoln Mills*, 353 U.S. 448 (1957) 41
Thorpe v. *Housing Authority*, 393 U.S. 268 (1969) 46
Todd Shipyards Corp. v. *Industrial Union of Marine and Shipbuilding Workers Local 39*, 344 F.2d 107 (2d Cir. 1965) 28
Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 (1979) 26
Trustees, Local 387 Pension Fund v. *Southern Stress Wire Corp.*, 509 F. Supp. 1097 (N.D. Ga. 1981) 13, 48
Trust Fund Services v. *Heyman*, 15 Wash. App. 452, 500 P.2d 547 (1976), *aff'd*, 88 Wash. 2d 698, 565 P.2d 805, *cert. denied*, 434 U.S. 987 (1977) 28
UMW (Consolidated Coal Co.), Case No. 6-CE-17 (1979) 27
UMW (Dixie Mining Co.), 188 NLRB 753 (1971) 4, 27
United Optical Workers Local 408 v. *Sterling Optical Co.*, 500 F.2d 220 (2d Cir. 1974) 28
United States v. *Bayer Co.*, 135 F. Supp. 65 (S.D. N.Y. 1955) 19
United States v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) 47
United States Steel Corp. v. *UMW*, C.A. No. 75-1966 (D.D.C., filed Nov. 24, 1975, decided Oct. 5, 1977) 4, 14
Vaca v. *Sipes*, 386 U.S. 171 (1967) 35
Vendo Co. v. *Lektro-Vend Corp.*, 433 U.S. 623 (1977) 26

TABLE OF AUTHORITIES—Continued

	Page
Viacom International, Inc. v. *Tandem Productions, Inc.*, 526 F.2d 593 (2d Cir. 1975)	18
Waggoner v. *Northwest Excavating, Inc.*, 642 F.2d 333 (9th Cir. 1981)	27
Waggoner v. *R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979)	27, 36
Walsh v. *Schlecht*, 429 U.S. 401 (1977)	17, 45
Washington Area Carpenters' Welfare Fund v. *Overhead Door Co.*, 488 F. Supp. 816 (D.D.C. 1980), *appeal pending*, (D.C. Cir. No. 80-1501)	13, 43, 47
Weil v. *Neary*, 278 U.S. 160 (1929)	19
Western Washington Laborers-Employers Health & Security Trust Fund v. *McDowell*, 103 LRRM 2219 (W.D. Wash. 1979), *appeal pending*, (9th Cir. No. 80-3024)	13, 43, 47
Yakus v. *United States*, 321 U.S. 414 (1944)	37
Statutes:	
Clayton Act, § 4, 15 U.S.C. § 15 (1976)	14
Employee Retirement Income Security Act of 1974, *as amended*:	
§ 3(14), 29 U.S.C. § 1002(14) (1976)	50
§ 404, 29 U.S.C. § 1104(a)(1)(B) (1976)	49
§ 406, 29 U.S.C. § 1106(a)(1)(B) (1976)	50
§ 502, 29 U.S.C. § 1132 (1976)	48
§ 502(a)(3), 29 U.S.C. § 1132(a)(3) (1976)	48
§ 502(g), 29 U.S.C. § 1132(g) (1976)	5, 48, 50
§ 515, 29 U.S.C.A. § 1145 (West Supp. 1976-80)	*passim*
§ 4402(e), 29 U.S.C.A. § 1461(e) (West Supp. 1976-80)	1, 46
Labor-Management Relations Act, *as amended*:	
§ 301, 29 U.S.C. § 185 (1976)	35, 48
§ 301(b), 29 U.S.C. § 185(b) (1976)	10
§ 302, 29 U.S.C. § 186 (1976 & Supp. III, 1979)	1, 44
§ 302(a), 29 U.S.C. § 186(a) (1976)	8, 39, 44, 45

TABLE OF AUTHORITIES—Continued

Page

§ 302(c)(5), 29 U.S.C. § 186(c)(5) (1976 & Supp. III, 1979) 44, 45
§ 303, 29 U.S.C. § 187 (1976) 33

Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208:

§ 3(a)(3), 29 U.S.C.A. § 1001a(a)(3) (West Supp. 1976-80) 37
§ 108(c), 29 U.S.C.A. § 1461(e) (West Supp. 1976-80) 1, 46
§ 207, 26 U.S.C.A. § 414(f) (West Supp. 1981) 37
§ 306(a), 29 U.S.C.A. § 1145 (West Supp. 1976-80) ..... *passim*
§ 306(b), 29 U.S.C. § 1132(g)(2) (West Supp. 1976-80) 1, 50

National Labor Relations Act, *as amended*:

§ 7, 29 U.S.C. § 157 (1976) 26
§ 8, 29 U.S.C. § 158 (1976) ..... *passim*
§ 8(b)(2), 29 U.S.C. § 158(b)(2) (1976) 25, 28
§ 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1976) 29
§ 8(e), 29 U.S.C. § 158(e) (1976) ..... *passim*
§ 8(f), 29 U.S.C. § 158(f) (1976) 13
§ 10(b), 29 U.S.C. § 160(b) (1976) 31
§ 10(1), 29 U.S.C. § 160(1) (1976) 30, 32
§ 14(c), 29 U.S.C. § 164(c) (1976) 32

Sherman Act:

§ 1, 15 U.S.C. § 1 (1976) ..... *passim*
§ 2, 15 U.S.C. § 2 (1976) ..... *passim*

Legislative Materials:

105 Cong. Rec. S5887-89 (daily ed. April 23, 1959), *reprinted in* II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 30
105 Cong. Rec. S6033 (daily ed. April 25, 1959), *reprinted in* II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 ..... 30, 31

TABLE OF AUTHORITIES—Continued

Page

105 Cong. Rec. S15906 (daily ed. Aug. 28, 1959), *reprinted in* II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 32

125 Cong. Rec.:

H2677 (daily ed. May 3, 1979) 39

S5291 (daily ed. May 3, 1979) 39

126 Cong. Rec.:

H4158 (daily ed. May 22, 1980) 40

H7863-7910 (daily ed. Aug. 26, 1980) 41, 42

H7899 (daily ed. Aug. 26, 1980) 42, 44, 46, 47

H7910 (daily ed. Aug. 26, 1980) 42

H9179 (daily ed. Sept. 19, 1980) 43

S10102 (daily ed. July 29, 1980) 41, 43

S10094 (daily ed. July 29, 1980) 41

S10169 (daily ed. July 29, 1980) 41

S11673 (daily ed. Aug. 26, 1980) 43, 44, 46, 47

S12901 (daily ed. Sept. 18, 1980) 43

S. 191, 63d Cong., 1st Sess. (1913) 21

S. 2552, 63d Cong., 1st Sess. (1913) 21

H.R. Rep. No. 1147, 86th Cong., 1st Sess. (1959), *reprinted in* I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 31

"Bills Relating to Trusts" S. Doc. No. 147, 57th Cong., 2d Sess. (1903) 21

Senate Labor and Human Resources Committee, 96th Cong., 1st Sess. "S. 209: The ERISA Improvements Act of 1979" (unnumbered Comm. Print 1979) 39, 44

Senate Labor and Human Resources Committee, 96th Cong., 2d Sess. "S. 1076: The Multiemployer Pension Plan Amendments Act of 1980" (unnumbered Comm. Print 1980) 40, 43

Other Authority:

Lockhart, *Violation of the Anti-trust Laws as a Defense in Civil Actions*, 31 Minn. L. Rev. 507 (1947) 21

BRIEF FOR RESPONDENTS

STATUTES INVOLVED

In addition to the statutes in Appendix E to the petition, the following statutes are involved: §§ 502(g), 515, and 4402(e) of the Employee Retirement Income Security Act of 1974, as amended and added by the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1208, 29 U.S.C.A. §§ 1132(g), 1145, and 1461(e) (West Supp. 1976-80) (Appendix A, *infra*, p. 1a); and § 302 of the Labor-Management Relations Act, as amended, 29 U.S.C. § 186 (1976 & Supp. III, 1979) (Appendix B, *infra*, p. 4a).

STATEMENT OF THE CASE

This case is here on certiorari from a decision of the Court of Appeals affirming summary judgment for the Trustees of the United Mine Workers of America Health and Retirement Funds ("Trustees"). The Trustees brought the action to recover health and pension fund contributions from Kaiser Steel Corporation ("Kaiser"), one of the employers signatory to the National Bituminous Coal Wage Agreement of 1974 ("1974 Agreement") (J.A. 11). It is undisputed that Kaiser

—voluntarily agreed in the 1974 Agreement to make contributions to the Funds for each ton of coal it handled, whether acquired by production or purchase;

—accepted its employees' services during the term of the Agreement;

—filed reports with the Trustees, required by the Agreement, which failed to disclose the coal it purchased on which contributions were due; and then

—after the Agreement had expired and it had accepted all services due it, repudiated its promise and refused to pay the agreed contributions on purchased coal when asked to do so by the Trustees, claiming that its agreement to do so had been unlawful all along.[1]

[1] See Trustees' Statement of Material Facts (J.A. 69-73), to which Kaiser took no exception (Pet. Br. 2 n.2).

On these undisputed facts the District Court granted summary judgment for the Trustees, and the Court of Appeals affirmed. Both courts held that Kaiser's claim that it had entered into an unlawful agreement with the United Mine Workers of America ("UMW")—violating both the Sherman Act, 15 U.S.C. §§ 1, 2 (1976), and § 8(e) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(e) (1976)—is not a proper defense to this collection action by trustees of a multiemployer health and pension fund. Kaiser's underlying claim was that the Agreement was intended to aid the UMW in organizing non-UMW producers. The courts below held, however, that an employer should not be allowed to assert such a defense regarding union objectives, thereby transforming a simple collection suit by health and pension fund trustees into a complex antitrust and "hot cargo" case and forcing the trust funds to bear the great cost of litigating such an employer-union dispute.

Since the appeal was from a summary judgment, it is essential to distinguish, as Kaiser's brief does not, between the undisputed facts of record material to that judgment, and certain other hotly contested facts relating to Kaiser's cross motion for summary judgment on the merits of its antitrust and § 8(e) defenses,[2] which was denied and not appealed. (Pet. App. 68a.) These disputed facts are not material to the issue presented here—whether the courts below were correct in holding that these defenses should not be entertained on their merits. We set forth below the undisputed material facts.

A. The Facts

1. *The 1974 Coal Wage Agreement*

This case concerns Kaiser's obligations under the 1974 Agreement, a collective bargaining agreement between the UMW and various associations of coal operators, and certain independent coal operators. The Agreement was executed on December 6, 1974, and terminated December

---

[2] See, *e.g.*, notes 3, 4, *infra*.

5, 1977. (J.A. 70.) Kaiser, a steel company engaged in mining, processing and purchasing coal, was a signatory to the 1974 Agreement. (J.A. 12, 58, 69, 70.)

Article XX of the 1974 Agreement provided for pension, health, and other benefits for covered employees, retired employees, and spouses and dependents of such employees, and established trusts from which these benefits were to be paid. (J.A. 26-37.) These trusts were established under and in compliance with § 302(c) of the Labor-Management Relations Act of 1947 ("LMRA"), as amended, 29 U.S.C. § 186(c) (J.A. 28), and are subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* (J.A. 12). Article XX(d) of the Agreement governed the funding of these trusts. It required signatory employers to contribute to each trust specified amounts on all coal they handled, whether produced by such employers or purchased from others who had not made contributions. (J.A. 29-32, 70-71.)[3] The contribution to be paid on purchased coal, under what is known as the "purchase-of-coal" clause, was essentially equivalent to that due on produced coal. (C.A.J.A. 463-64, 570-71, 636-39.)[4] The

[3] The most important factual dispute between the parties on the merits of Kaiser's antitrust and § 8(e) defenses concerns the purpose of a clause in the 1974 Agreement requiring contributions on purchased coal. Kaiser's basic factual claim is that the clause was intended to cause UMW signatories who purchase coal to boycott non-UMW producers, so as to assist the UMW in organizing the latter. (Pet. Br. 3-4.) In opposition to Kaiser's cross motion for summary judgment, the Trustees presented affidavits showing that the clause requiring contributions on purchased coal was included in the 1974 Agreement to preserve the work and work standards of UMW employees and to assure the continuing viability of the Funds. (C.A.J.A. 568-70, 572-75, 629, 637-38.)

[4] In this respect the purchase-of-coal clause in the 1974 Agreement differed from previous national agreements, which had required employers to pay a *larger* contribution for purchased coal than for produced coal. The excess charged in the earlier agreements was sometimes referred to as a "penalty." (C.A.J.A. 570, 587-93.) Despite the "penalty" feature, the earlier clause was

1974 Agreement also required signatory employers to make monthly reports of coal produced and purchased and contributions due thereon. (J.A. 35.) The Agreement provided for negotiation of a replacement provision in the event the purchase-of-coal clause was challenged successfully. (J.A. 32.)

2. Kaiser's Coal Purchases and Reports to the Trustees

Throughout the term of the 1974 Agreement, Kaiser filed monthly reports ("remittance advice forms") of coal produced and the contributions due thereon. Kaiser failed to report that it had also purchased coal on which contributions had not been made.[5] Nor did Kaiser ever advise the Trustees that it refused to pay the amounts due under the purchase-of-coal clause or that it took the position that the clause was illegal. (J.A. 71-72; C.A.J.A. 630-34.)[6]

Prior to expiration of the 1974 Agreement, the Trustees received a report of Kaiser's purchases[7] and mounted an

---

upheld by the NLRB. *UMW (Dixie Mining Co.)*, 188 NLRB 753 (1971). Nevertheless, to end objections to the clause, the parties to the 1974 Agreement eliminated "[w]hatever penalty may have been implicit in the disparity of payments in the earlier clause" (642 F.2d at 1306; Pet. App. 4a) by fixing contributions in a way that required substantially the same contribution whether the coal was produced or purchased.

[5] Copies of the remittance advice forms submitted by Kaiser are in the record. (C.A.J.A. 192-275.)

[6] In 1975, U.S. Steel Corporation, another signatory to the 1974 Agreement, brought an action against the UMW and the Trustees for a declaratory judgment that the purchase-of-coal clause violated § 8(e) and the Sherman Act. *U.S. Steel Corp.* v. *UMW*, C.A. No. 75-1966 (D.D.C.). The Trustees counterclaimed for the unpaid contributions. The District Court, without reaching the § 8(e) issue, determined that the clause did not violate the antitrust laws. (Order of Oct. 5, 1977.) The lawsuit was subsequently settled when U.S. Steel paid the full amount of the contributions owed. Kaiser did not join this suit, bring its own suit, or pay its contributions as a result of the outcome of the *U.S. Steel* suit. (C.A.J.A. 182.)

[7] The issue as to when the Trustees learned of Kaiser's purchases has been contested. The Trustees contend that they did not

investigation. The Trustees then demanded payment; when Kaiser refused, this suit was filed. (J.A. 72; C.A.J.A. 181-82.) Kaiser subsequently disclosed that the unpaid contributions called for by the purchase-of-coal clause in the 1974 Agreement were $1,557,865.[8]

B. Decisions Below

The District Court granted the Trustees' motion for summary judgment, holding that Kaiser's Sherman Act and § 8(e) defenses should not be entertained, and awarded attorneys' fees. (466 F. Supp. 911; Pet. App. 70a.) The Court of Appeals affirmed. It held that under the principles of *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960), Kaiser's illegality defenses should not be entertained in this suit by pension fund Trustees for delinquent contributions; that, under this Court's holding in *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), since the contract had been fully performed by the employees, Kaiser could not avoid its obligation to pay the agreed-upon consideration by claiming that the Agreement violates the antitrust laws; and that Kaiser's § 8(e) defense fell within the NLRB's exclusive jurisdiction over unfair labor practices. The Court also affirmed the District Court's award of attorneys' fees pursuant to § 502(g) of ERISA. (642 F.2d 1302; Pet. App. 1a.)

---

know anything of Kaiser's purchases until they received a report from a union member in June 1976. (C.A.J.A. 181.) Kaiser contends that the Trustees knew long before the commencement of the 1974 Agreement and nevertheless chose not to enforce the clause. (Pet. Br. 7.) Kaiser's contention is without adequate affidavit support to create a genuine issue of fact. It is based on the alleged knowledge of Anthony Boyle, whose tenure as a Trustee terminated prior to the 1974 Agreement and whose knowledge, therefore, could not be attributed to the Trustees under the 1974 Agreement (C.A.J.A. 468, 470). The Court of Appeals, however, assumed that for purposes of summary judgment Kaiser's view of this issue is to be taken as correct. As the Court further noted, though, the materiality of this fact is "marginal." (642 F.2d at 1307 n.3; Pet. App. 6a n.3.)

[8] Letter of Kaiser's counsel dated June 25, 1979, attached as Appendix A to Trustees' Brief in the Court of Appeals.

SUMMARY OF ARGUMENT

1. The Court of Appeals' refusal to entertain Kaiser's Sherman Act and § 8(e) defenses was a sound application of this Court's decision in *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960). *Benedict* rests on the principle that the contractual obligation of an employer to make contributions to employee trust funds should not be subject to ordinary defenses arising out of disputes between the employer and the union, because such contributions are a form of compensation to the employees and because the employees and their dependents should not be penalized for union misconduct over which they have little or no control. As several courts have reasoned, permitting an employer to defend failure to make contributions to employee trust funds required by a collective bargaining agreement—after all employee services under the agreement have been performed—on the ground that the agreement is unlawful, would unfairly penalize employees for union misdeeds and would transform a simple collection suit into a complex antitrust or labor law case. On the other hand, refusal to entertain such a defense has the constructive effect of forcing the employer to litigate its contention that the contract is illegal before employees render their services thereunder in reliance on the employer's promise of contributions. Moreover, rejection of Kaiser's illegality defenses poses no risk of circumvention of the antitrust or labor laws, for employers in its position have ample statutory remedies for violations of the Sherman Act and § 8(e) of the NLRA.

2. Apart from the principles of *Benedict*, the Court of Appeals' refusal to entertain Kaiser's Sherman Act defense was also a correct application of the settled standards for recognition of the defense of antitrust illegality in actions to recover the contract price for delivered goods or services. In *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), this Court established that the defense of Sherman Act illegality should not be allowed in suits seeking the contract price for delivered goods or services unless

giving judgment on the contract would be enforcing the precise conduct made unlawful by the Act. The rule of *Kelly* is based on the dual principles that a party to a contract should not be permitted to reap the benefits of his bargain and subsequently disclaim his own obligation to perform and that the Sherman Act's express remedies should not be judicially supplemented with the arbitrary and capricious sanction of contract avoidance. Both principles are squarely applicable here. Moreover, this case does not fall within the narrow exception to the *Kelly* rule—where giving judgment for the plaintiff would be enforcing the precise conduct made unlawful by the Sherman Act—because Kaiser's antitrust defense is essentially a claim that the purchase-of-coal clause constitutes an unlawful boycott of non-UMW producers, and ordering the agreed-upon payments would not accomplish that boycott.

3. Apart from the principles of *Benedict*, the Court of Appeals also properly refused to entertain Kaiser's § 8(e) defense on the ground that it charges an unfair labor practice within the exclusive jurisdiction of the NLRB. Since this Court's decisions in *Garner* v. *Teamsters Local 776*, 346 U.S. 485 (1953), and *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), it has been clear that Congress' commitment of authority for hearing and resolving unfair labor practice charges to the NLRB bars the state and federal courts from adjudicating such charges. The language and history of § 8(e) support application of the NLRB exclusive jurisdiction doctrine to preclude Kaiser's unfair labor practice defense. Although § 8(e) declares hot cargo agreements, whether "entered into heretofore or hereafter[,] . . . unenforcible and void," the context and history of that language make clear that its purpose was to make enforcement of hot cargo agreements, whenever executed, subject to the NLRB's exclusive unfair labor practice jurisdiction and to describe the status of agreements after the NLRB has determined them to be within the proscription of § 8(e). Finally, Kaiser's contention that

the Court of Appeals' construction of § 8(e) renders the national labor laws unconstitutional was neither raised before nor considered by the courts below and therefore should not be entertained by this Court. It is, in any event, meritless.

4. Nine days after the Court of Appeals rendered its decision in the case at bar, Congress enacted legislation —§ 306(a) of the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1295—that requires affirmance of the Court of Appeals' judgment. The purpose of § 306(a), as its language and legislative history make clear, is to ensure that trustees of multiemployer pension plans can collect delinquent contributions in accordance with the terms and conditions of the collective bargaining agreement, free of employer claims and defenses arising out of employer-union disputes over the legality of that agreement. The legislative history specifically indicates that § 306(a) is a statutory endorsement of the judicial decisions on which the Court of Appeals' judgment is based and a disapproval of decisions that have entertained employer defenses analogous to those Kaiser seeks to raise. The only illegality defense available to an employer under § 306(a) is that the payment would violate § 302 (a) of the LMRA, 29 U.S.C. § 186(a) (1976), which proscribes payments by an employer to a representative of his employees in the absence of a qualified trust, a defense not involved in the present case. Section 306(a) governs cases pending on the date of its enactment and hence requires affirmance of the Court of Appeals' judgment.

5. The award of attorneys' fees to the Trustees was statutorily authorized because this suit was properly brought under ERISA. Moreover, the Multiemployer Pension Plan Amendments Act of 1980 specifically authorizes attorneys' fees in cases such as this. Respondents submit, however, that the attorneys' fee issue should not be considered since Kaiser did not contest the Trustees' claim for attorneys' fees when the Trustees moved for summary judgment in the District Court.

ARGUMENT

I. THE COURT OF APPEALS' REFUSAL TO ENTERTAIN KAISER'S DEFENSE THAT THE PURCHASE-OF-COAL CLAUSE IS UNLAWFUL WAS A PROPER APPLICATION OF THE PRINCIPLES OF THIS COURT'S DECISION IN *LEWIS* v. *BENEDICT COAL CORPORATION*

The Trustees brought this suit to recover delinquent contributions due the Funds pursuant to the purchase-of-coal clause of Article XX(d) of the 1974 Agreement. Kaiser defended by asserting that the purchase-of-coal clause was an unlawful restraint of trade and a hot cargo clause which excused its failure to make the agreed contributions. Although Kaiser was free throughout the term of the 1974 Agreement to institute legal challenge to the clause, it chose not to do so and instead simply ignored its contractual obligations to report its purchases of coal and make the prescribed contributions thereon while accepting the services of its employees.[9]

Following *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960), and recognizing that overdue contributions to health and retirement trust funds are a form of compensation to the employees for services already rendered, the courts have been unreceptive to attempts by employers to defend their failure to make prescribed contributions on the ground that the agreement requiring them is unlawful. The Court of Appeals' refusal to entertain Kaiser's illegality defenses was a proper application of this principle and is consonant with national antitrust and labor policy.

---

[9] As the Court of Appeals explained, the 1974 Agreement (J.A. 32) granted the UMW the "right to require the parties to meet and negotiate in good faith a replacement of the purchase-of-coal clause if the clause is adjudged to be invalid or unlawful." (642 F.2d at 1306 & n.2; Pet. App. 4a-5a & n.2.) By asserting the alleged illegality of the purchase-of-coal clause only after the 1974 Agreement had expired, Kaiser deprived the UMW of the right to bargain for a replacement provision for contributions to the Funds in the event the clause is adjudged unlawful. (642 F.2d at 1312-13; Pet. App. 17a-19a.)

A. *Benedict* Recognizes that Contractual Obligations of an Employer to Make Contributions to Employee Trust Funds Are Not Subject to Ordinary Contractual Defenses

In *Benedict*, a coal operator defended its failure to make prescribed contributions to an employee trust fund on the ground that its obligation was excused by the union's breaches of the agreement (by strikes and work stoppages). This Court ruled that the defense could not be asserted, that the union's performance of its promises was not a condition precedent to the operator's duty to make contributions to the fund (361 U.S. at 464-66), and that although an ordinary third-party beneficiary's rights may appropriately be subject to set-offs or defenses arising out of the promisee's (*i.e.*, the union's) breaches (*id.* at 467-68), special considerations applicable to a collective bargaining agreement requiring an employer to make payments to its employees' welfare and retirement fund precluded assertion of the set-off (*id.* at 468-71).

In particular, the Court regarded the employer's contributions to the fund as "really another form of compensation to the employees" and reasoned that "as such the obligation to pay royalty might be thought to be incorporated into the individual employment contracts." *Id.* at 469. The Court also examined the "impact of the national labor policy," noting that § 301(b) of the LMRA, 29 U.S.C. § 185(b), "evidences a congressional intention that the union as an entity, like a corporation, should in the absence of agreement be the sole source of recovery for injury inflicted by it." 361 U.S. at 470. "Although this policy was prompted by solicitude for the union members," the Court deemed it "to apply with even greater force to protecting the interests of beneficiaries of the welfare fund, many of whom may be retired, or may be dependents, and therefore without any direct voice in the conduct of union affairs." *Id.* Relying on these and related considerations, the Court held that the employer's asserted set-off based on the union's breaches was precluded. *Id.* at 470-71.

B. The Courts Have Repeatedly Refused to Entertain the Defense that a Collective Bargaining Agreement Requiring Contributions to Employee Trust Funds Is Illegal

Drawing on *Benedict*, courts have repeatedly dismissed arguments by employers that the purported illegality of collective bargaining agreements requiring contributions to employee health and retirement trust funds should excuse them, after the employee services have been performed, from making the prescribed contributions. Allowance of the illegality defense in this context, the courts have said, would penalize employees and their dependents for alleged union misdeeds over which they have little control and would often transform a simple collection action into a complex antitrust or unfair labor practice case; conversely, disallowance has the constructive effect of forcing the employer to litigate its contention that the contract is illegal before employees render their services thereunder in reliance on the employer's promise of contributions.

Thus, in *Huge* v. *Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979), the Third Circuit refused to entertain the employer's defense that it need not make contributions to the UMW Health and Retirement Funds because the 1974 Agreement providing for such contributions was unlawful under the Sherman Act. The employer, a hauler of coal, claimed that it had signed the 1974 Agreement due to union pressure enforcing an unlawful restraint of trade (a clause in the Agreement prohibiting signatory employers from contracting the handling of coal to non-signatory haulers), which pressure vitiated the entire contract, including the obligation to contribute to the Funds. 590 F.2d at 458-60 (opinion of Seitz, C. J.); *id.* at 461-62 (Adams, J., concurring); *id.* at 466-67 (Rosenn, J., dissenting). Relying on *Benedict*, Chief Judge Seitz refused to consider the employer's antitrust defense with respect to overdue obligations because "such payments 'have the characteristics of compensation to the employees

for services they have already rendered.'" *Id.* at 459 (quoting *Lewis* v. *Seanor Coal Co.*, 382 F.2d 437, 441 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968)).

Judge Adams, concurring, held with respect to both retrospective and prospective relief[10] "that where the trustees of a union welfare or pension fund sue to compel an employer to make contributions as stipulated in the labor contract between the employer and the union, the employer may not assert *any* defenses that he may arguably have to that contract." *Id.* at 463. He reasoned that insulation of the employer's obligation to contribute from employer defenses to the labor contract serves "vital public interests," including protection of the expectations of the employees regarding their compensation, and avoidance of the unfairness of penalizing employees, retirees, and dependents for alleged union misconduct over which they have little control.[11] *Id.* at 464-65. Judge Adams also noted the desirability, "as a matter of judicial administration," of requiring the employer to sue the

---

[10] Unlike the present case, the Trustees in *Long's Hauling* also sought to "compel future payment of royalties as yet unearned." 590 F.2d at 459.

[11] Numerous courts have applied these principles in refusing to consider employer defenses based on union conduct in suits to recover delinquent contributions to employee health and retirement trust funds. *E.g.*, *Pennington* v. *UMW*, 325 F.2d 804, 818-19 (6th Cir. 1963), *cert. denied*, 381 U.S. 949 (1965) (refusing to entertain employer's claim that labor contract was illegal); *Boyle* v. *North Atl. Coal Corp.*, 331 F. Supp. 1107 (W.D. Pa. 1971) (refusing to entertain employer's claim that oral understanding with union relieved it of royalty obligation); *Lewis* v. *Seanor Coal Co.*, 256 F. Supp. 456 (W.D. Pa. 1966), *aff'd*, 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968) (refusing to entertain employer's claims of illegality of agreement and estoppel based on oral representations of union); *Lewis* v. *Harcliff Coal Co.*, 237 F. Supp. 6 (W.D. Pa. 1965) (refusing to entertain employer's claim that union fraud and other misdeeds surrounded execution of agreement); *Goldies, Inc.* v. *Alaska Hotel Employees Fund*, 622 P.2d 979, 981 & n.7 (Alas. 1981) ("invalidity or illegality of a collective bargaining agreement does not alter the employer's duty to make employee benefit contributions").

union directly if it believes it is excused from performance of part or all of the collective bargaining agreement by the union's alleged violations of law. *Id.* at 465.

Similarly, in *Trustees, Local 387 Pension Fund* v. *Southern Stress Wire Corp.*, 509 F. Supp. 1097 (N.D. Ga. 1981), the court refused to allow an employer to interpose, in a suit to recover delinquent contributions to a pension fund, the defense that the agreement requiring such payments is legally unenforceable. The agreement at issue was a prehire agreement authorized by § 8(f) of the NLRA, 29 U.S.C. § 158(f), which, as this Court held in *NLRB* v. *Local 103, Int'l Ass'n of Bridge Workers* (*Higdon*), 434 U.S. 335, 344-52 (1978), is unenforceable by the union absent a showing that it represents a majority of the employees in the relevant bargaining unit. Nevertheless, the court in *Southern Stress Wire*, relying on this Court's decision in *Benedict*, ruled that the union's lack of majority status is not a defense to a suit to recover delinquent contributions to a pension fund required by the terms of a prehire agreement, since such contributions are in reality compensation for services already rendered by the employees. 509 F. Supp. at 1103-04.[12]

The Court of Appeals' refusal to entertain Kaiser's illegality defenses was thus a straightforward application of the principle that emerges from *Benedict* and its progeny: employers should not be allowed to repudiate their promises to make contributions to employee trust funds, where the employer's quarrel is with the union, not the bene-

---

[12] Some courts have held that *Higdon* bars suits to recover delinquent contributions to employee benefit funds called for by a prehire agreement absent proof that the union represents a majority of the unit's employees. *E.g., Washington Carpenters' Welfare Fund* v. *Overhead Door Co.*, 488 F. Supp. 816 (D.D.C. 1980), *appeal pending*, (D.C. Cir. No. 80-1501); *Western Washington Trust Fund* v. *McDowell*, 103 LRRM 2219 (W.D. Wash. 1979), *appeal pending*, (9th Cir. No. 80-3024). As explained below, Congress expressly disapproved these decisions in enacting § 306(a) of the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1295. See pp. 43-44, *infra*.

ficiaries of the trust fund, and where the employees have already performed their services pursuant to the agreement.

C. The Court of Appeals' Decision Is Consistent with National Antitrust and Labor Policy

Kaiser suggests that if the Court of Appeals' application of the principles of *Benedict* to deny recognition of its illegality defenses is correct, then "parties would be able to circumvent the antitrust and labor laws simply by casting illegal restraints in the form of clauses that require penalty payments to [pension] funds." (Pet. Br. 31.) Kaiser's concern is unfounded, for it ignores the adequate legal remedies available to employers in its position.

For as long as permitted by the applicable statute of limitations, Kaiser has been free to file an antitrust action against the UMW, the other party to the agreement, challenging the purchase-of-coal clause as an unlawful boycott. If as of the date of such a suit Kaiser had sustained an injury in its "business or property" within the meaning of § 4 of the Clayton Act, 15 U.S.C. § 15, traceable to the clause, it could seek treble damages. Otherwise, Kaiser could seek a declaratory judgment that the clause violates the antitrust laws, as did U.S. Steel, another signatory employer. See note 6, *supra*. Although Kaiser's antitrust dispute is with the UMW, it could properly join the Trustees as party-defendants in an antitrust suit against the Union and seek prospective relief from the obligation to contribute to the Funds.[13] Similarly, for as long as permitted by the applicable statute of limitations,[14] Kaiser has been entitled to file an unfair labor practice charge with the NLRB, assailing the

---

[13] *Benedict* and its progeny make clear that Kaiser's only recourse regarding delinquent contributions for which employee services have already been performed is against the UMW, not the Funds.

[14] See generally *Bricklayers Union* v. *NLRB*, 562 F.2d 775, 781-83 (D.C. Cir. 1977).

purchase-of-coal clause as a hot cargo provision violative of § 8(e).

Accordingly, disallowance of Kaiser's illegality defenses opens no gap in enforcement of the antitrust or labor laws. The Court of Appeals' decision does not trench on the ample remedies Congress has prescribed for violations of the Sherman Act and § 8(e).

II. THE COURT OF APPEALS' REJECTION OF KAISER'S ANTITRUST DEFENSE WAS A CORRECT APPLICATION OF *KELLY* v. *KOSUGA*

Apart from the principles of *Benedict*, Kaiser's antitrust defense is also precluded by settled standards for entertaining such defenses in actions to recover the contract price for delivered goods or services. These standards were most recently articulated by this Court in *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), and were properly applied by the Court of Appeals. (642 F.2d at 1309-10; Pet. App. 10a-15a.)

A. *Kelly* Establishes that the Defense of Antitrust Illegality Should Not be Entertained in a Suit to Recover the Contract Price for Delivered Goods or Services

In *Kelly*, this Court restated and clarified the standards for entertaining the defense of Sherman Act illegality in actions to recover the contract price for delivered goods or services. Kosuga and an associate, owners of large amounts of onions, informed Kelly and other onion growers that unless the growers purchased a large portion of these onions, they would deliver them on the futures exchange and depress the price. 358 U.S. at 517. Kelly and the other growers, fearful of the economic loss they would suffer were the onion market flooded, agreed to purchase 287 carloads of onions, in exchange for the promise of Kosuga and his associate that they would not deliver any onions on the futures market for the balance of the current trading season. The purpose of this agreement was admittedly to stabilize the price of onions. *Id.*

Kelly refused to accept delivery of 37 carloads; the onions deteriorated; and Kosuga brought suit to recover the contract price. Kelly "interposed the defense that the sale was made pursuant to and as an indivisible part of an agreement which violated § 1 of the Sherman Anti-trust Act . . . ." *Id.* at 516. The district court struck the defense, the court of appeals affirmed, and this Court granted certiorari to consider whether the defense of Sherman Act illegality should be allowed when the plaintiff is "seeking to invoke the aid of the Federal District Court to enforce the very agreement which constituted, in itself, a violation of the Sherman Anti-Trust Act of 1890." Petition for Writ of Certiorari at 3, *Kelly* v. *Kosuga.*

This Court affirmed, stating:

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. This has been notably the case where the plea has been made by a purchaser in an action to recover from him the agreed price of goods sold." *Id.* at 518 (footnote omitted).

The Court succinctly stated the governing rule and its dual rationale: [15]

> "Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the [Sherman] Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.' *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, [212 U.S. 227] at 271 (dissenting opinion). Supplying a sanction

---

[15] The essence of the rule of *Kelly* was foreshadowed by the Court's ruling in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 755 (1947) (antitrust defense should be entertained only where the contract "has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought. . . .").

> for the violation of the Act, not in terms provided and capricious in its operation, . . . is avoided by treating the defense as so confined." *Id.* at 520-21 (citation omitted).

Because it could not "be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price," Kelly's Sherman Act defense was deemed properly stricken. *Id.* at 521.

Kaiser argues that *Kelly* "applied the long-settled rule that a lawful contract provision—the sale agreement at issue in that case—may be enforced, so long as it is severable from the illegal portion of the contract[;] [b]ut it left intact . . . the corollary rule that a court will not enforce an illegal contract provision." (Pet. Br. 13.) Kaiser's contention simply restates the precise argument raised by the petitioner in *Kelly* and rejected by the Court. Brief for Petitioner at 7, *Kelly* v. *Kosuga*. This Court accepted the petitioner's allegation that the promise to pay for the onions was "an indivisible part of an agreement which violated § 1 of the Sherman Antitrust Act." 358 U.S. at 516. But it rejected the relevance of this characterization, holding that "analysis in terms of 'divisibility' or some other verbal formula may well be circular" (*id.* at 521), and that unless giving judgment on the contract would "itself be enforcing the precise conduct made unlawful by the Act" (*id.* at 520), the defense that the contract is unlawful under the Sherman Act should not be recognized.[16]

---

[16] After noting the fallacy of analysis in terms of divisibility, the Court added that "in any event, where, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question." 358 U.S. at 521. Like the purchase of onions, Kaiser's agreement to make contributions to the Funds, measured in part by the tons of coal purchased, constituted an "intelligible economic transaction in itself." *Cf. Walsh* v. *Schlecht*, 429 U.S. 401 (1977) (enforcing a clause in a collective bargaining agreement requiring an employer

Thus, the rule of *Kelly* is that where a contract has been performed by one side, the non-performing party may not avoid his obligations by arguing that the contract was entered into in violation of the antitrust laws, so long as giving judgment on the contract would not involve the court in enforcing or requiring the very conduct proscribed by the antitrust laws.[17] None of the cases

---

to make payments to its employee benefit fund based on hours of work performed by non-union employees of a non-signatory subcontractor).

[17] Kaiser makes the extravagant claim that "until this case no court had ever enforced an illegal contract clause." (Pet. Br. 19.) In fact, the rule of *Kelly* has been followed consistently whenever, after one party to a contract has already performed, the other party tries to avoid his obligations by arguing that the contract was unlawful under the antitrust laws. See, *e.g.*, *Arkla Air Conditioning Co.* v. *Famous Supply Co.*, 551 F.2d 125, 126-27 (6th Cir. 1977) (per curiam) (refusing to consider defense that exclusive distributorship clause violates Sherman Act in suit for damages for breach of that clause); *Viacom Int'l, Inc.* v. *Tandem Prod., Inc.*, 526 F.2d 593, 598-600 (2d Cir. 1975) (rejecting antitrust defense, not on ground that contract at issue was severable from allegedly illegal tying arrangement, but rather because recognition of defense might unjustly enrich defendant and would transform a simple contract suit into a complex antitrust case); *El Salto, S.A.* v. *PSG Co.*, 444 F.2d 477, 481-83 (9th Cir.), *cert. denied*, 404 U.S. 940 (1971) (although the alleged antitrust violation is inherent in the very contract sued upon, such a violation is not a defense to an action for the contract price for delivered coffee); *Sunshine Packers, Inc.* v. *American Can Co.*, 395 F.2d 86, 87-88 (5th Cir. 1968) (although loan may have violated antitrust decree, that constitutes no defense to an action on the note evidencing the loan); *Pennington* v. *UMW*, 325 F.2d 804, 818-19 (6th Cir. 1963), *cert. denied*, 381 U.S. 949 (1965) (even if trustees of benefit fund had engaged in conspiracy to drive small coal operators out of business by, *inter alia*, imposition of contract requiring employer contributions, that constitutes no "bar to the right of the Trustees to collect the royalty payments which had accrued under the contract on the coal already mined"); *Mullins* v. *Reitz Coal Co.*, 105 LRRM 2776, 2778-79 (D.D.C. 1979) (enforcing claim for delinquent contributions pursuant to purchase-of-coal clause despite defense that clause violates Sherman Act).

cited by Kaiser is inconsistent with this interpretation of *Kelly*.[18]

---

[18] Kaiser seeks to rewrite this Court's opinion in *Kelly*, suggesting that this Court's formulation of the narrow circumstances when an illegality defense founded on the Sherman Act will be entertained in a suit to recover the contract price for delivered goods or services—"where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act"—be revised to mean "enforcing the particular illegal contractual promise." (Pet. Br. 18 n.18) According to Kaiser, courts have uniformly refused to enforce illegal contract clauses, "[r]egardless whether their orders would bring about conduct that is itself illegal. . . ." (Pet. Br. 19.) This is incorrect. See note 17, *supra*. In support of this statement, Kaiser discusses or cites *Barrows* v. *Jackson*, 346 U.S. 249 (1953); *Weil* v. *Neary*, 278 U.S. 160 (1929); *McMullen* v. *Hoffman*, 174 U.S. 639 (1899); *Carpa, Inc.* v. *Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976); *Farbenfabriken Bayer, A.G.* v. *Sterling Drug, Inc.*, 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963); *Kogod* v. *Stanley Co.*, 186 F.2d 763 (D.C. Cir. 1950); *Eiberger* v. *Sony Corp.*, 459 F. Supp. 1276 (S.D.N.Y. 1978), *aff'd in part and rev'd in part*, 622 F.2d 1068 (2d Cir. 1980); *Premier Elec. Constr. Co.* v. *Miller-Davis Co.*, 291 F. Supp. 295 (N.D. Ill. 1968), *aff'd*, 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970); *United States* v. *Bayer Co.*, 135 F. Supp. 65 (S.D.N.Y. 1955); *Revlon, Inc.* v. *Williams Int'l, Inc.*, 30 Misc. 2d 772, 214 (N.Y.S. 2d 456 (Sup. Ct. 1961). (Pet. Br. 19-22.) None is apposite.

In *Revlon* and *Carpa*, the courts clearly distinguished between enforcement of an illegal contract requiring future conduct and one for goods or services already delivered, and indicated that the illegality defense was allowable only in the former circumstances. *Carpa*, 536 F.2d at 54-55 & n.6; *Revlon*, 214 N.Y.S. 2d at 460. In *Kogod* and *Eiberger*, the party raising the defense of illegality had not been unjustly enriched. In *Kogod*, the plaintiff was a third-party beneficiary of the contract on which he sued who had not delivered any goods or performed any services for which he was entitled to be paid. 186 F.2d at 764-65. In *Eiberger*, the court stressed that the plaintiff was seeking to recover an "unearned" service fee. 459 F. Supp. at 1289.

Both *Bayer* cases and *Premier Electrical* involved agreements where the consideration offered by the party seeking enforcement of the contract was itself illegal. 307 F.2d at 208-10; 135 F. Supp. at 68-73; 291 F. Supp. at 302-03. In other words, in these cases, as with the "hired murderer" hypothetical proposed by Kaiser (Pet.

B. The Rationale of *Kelly* Applies Here

The rationale of *Kelly* is twofold. First, people should not be able to get "other people's property for nothing when they purport to be buying it." 358 U.S. at 520-21 (quoting *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U.S. 227, 271 (1909) (Holmes, J., dissenting)). In other words, a party to a contract should not be permitted to reap the benefits of his bargain and subsequently disclaim his own obligation to perform. Second, the "Sherman Act's express remedies [should] not be added to judicially by including the avoidance of private contracts as a sanction." 358 U.S. at 519 (citing *D. R. Wilder Mfg. Co.* v. *Corn Prod. Ref. Co.*, 236 U.S. 165, 174-75 (1915)). See also *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 (1972).[19]

Br. 18-19), one party to the contract performed some agreed-upon unlawful conduct (*e.g.*, price fixing, murder) and then sought the aid of the court in securing payment for the illegal services rendered. Here, on the other hand, the consideration received by Kaiser was the lawful performance by its employees of the service obligations prescribed by the collective bargaining agreement. *Weil* involved an attempt by an attorney for creditors to enforce a fee-sharing agreement with an attorney for trustees in bankruptcy. The consideration offered by the party seeking enforcement—supervision of the attorney for the trustees in bankruptcy—was itself unlawful. Additionally, there was no claim that nonenforcement of this agreement would result in unjust enrichment and no contention that Congress had provided exclusive remedies for such violations. Similarly, in *McMullen*, the services (bid rigging) performed by the party seeking an accounting were unlawful. 174 U.S. at 645-46. Beyond that, the Court emphasized that the contract involved fraud and dishonesty. *Id.* at 649, 669. Moreover, *McMullen* did not involve the defense of antitrust illegality, and thus did not require the Court to assess the appropriateness of adding to the statutory remedies Congress has provided.

Barrows held that a racial restrictive covenant could not be enforced in a suit for damages, since to do so would deprive non-Caucasians of equal protection. 346 U.S. at 254. No question of unjust enrichment, or of adding to congressionally prescribed remedies for a statutory violation, was presented.

[19] The legislative history of the federal antitrust statutes reveals that Congress repeatedly rejected bills that would have authorized

Both reasons fully apply to this case. Kaiser concedes that the purchase-of-coal clause is "part of the total consideration [promised] by Kaiser Steel" in exchange for the services of its employees over the three-year term of the Agreement. (Pet. Br. 28 n.52.) Kaiser received those services, reaped the benefits for which it had bargained, and now seeks to avoid its reciprocal obligation. To allow Kaiser to escape paying the compensation owed to its employees would result in an unjust windfall to Kaiser.

Recognition of Kaiser's antitrust defense would also be inconsistent with this Court's admonition that the statutory remedies for violation of the antitrust laws should not be judicially supplemented with the "avoidance of private contracts as a sanction." Kaiser has long been at liberty to file an antitrust action seeking relief with respect to the purchase-of-coal clause and the congressionally prescribed remedies have been fully adequate to protect it against antitrust injury.[20]

---

violations of the antitrust laws to be asserted as a defense in contract actions. Seven of the bills introduced in the same month as the Sherman Act contained provisions to that effect. "Bills Relating to Trusts" S. Doc. No. 147, 57th Cong., 2d Sess. (1903). None of these provisions was even brought to a vote. When the Clayton Act was adopted, Congress rejected proposals by Senator LaFollette which would have authorized such a defense. S. 191, S. 2552, 63d Cong., 1st Sess. (1913). By contrast, several state antitrust laws enacted in the same period provided that the purchaser from a violater could prove the violation as a complete defense to an action for the contract price. See Lockhart, *Violation of the Anti-trust Laws as a Defense in Civil Actions*, 31 Minn. L. Rev. 507, 508-09 (1947).

[20] Kaiser argues that the availability of statutory antitrust remedies does not preclude its illegality defense, relying on *Bement* v. *National Harrow Co.*, 186 U.S. 70 (1902). (Pet. Br. 23-24.) *Bement*, a case between a patentee and a licensee of the patent decided at the dawn of the antitrust era, states that "any one sued upon a contract may set up as a defence that it is a violation of the [Sherman Act], and if found to be so, that fact will constitute a good defence to the action." 186 U.S. at 88. This statement did not survive this Court's holdings in *Bruce's Juices, Inc.*, v. *Amer-*

C. Ordering Kaiser to Make Prescribed Contributions to the Funds Is Not Enforcing the Precise Conduct Made Unlawful by the Sherman Act

Kaiser argues that this case comes within the narrow exception to the *Kelly* rule—that ordering it to make promised payments to the Funds would be enforcing the precise conduct made unlawful by the Sherman Act. (Pet. Br. 16-18.) However, Kaiser's antitrust defense is essentially a claim that the purchase-of-coal clause constitutes an unlawful boycott of non-UMW coal producers (*id.* 3-5), and ordering the agreed-upon payments would not accomplish that boycott. As the District Court said: "The contract is at an end—decisions to purchase or not to purchase have been made and acted upon." (466 F. Supp. at 915; Pet. App. 77a.) Enforcement of Kaiser's obligation under the 1974 Agreement will not undo or affect those decisions.

Kaiser and amicus Pennsylvania Coal Mining Association ("PCMA") suggest that ordering Kaiser to make the prescribed payments will cause future boycotts of non-UMW producers because the 1978 and 1981 UMW collective bargaining agreements also contain purchase-of-coal clauses. (Pet. Br. 16-18 & n.23; Brief of PCMA 2-7.) Those separate contracts are not at issue here. The 1978 Agreement has expired and to the extent that enforcement of the 1974 Agreement may influence present or prospective purchasing decisions under the current 1981 Agreement, Kaiser, other signatory employers, and non-UMW producers all have ample remedies available to them under the antitrust laws, including suits for declaratory relief and treble damages. "[T]he Sherman Act's express remedies [should] not be added to ju-

---

ican Can Co., 330 U.S. 743 (1947), see *id.* at 761 (Murphy, J., dissenting, relying on *Bement*), and *Kelly* v. *Kosuga*, 358 U.S. at 520-21 (narrowing the Court's holding in *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U.S. 227 (1909) and endorsing Justice Holmes' dissent, a case where the majority relied on the broad language in *Bement*, *id.* at 265).

dicially by including the avoidance of private contracts as a sanction." *Kelly* v. *Kosuga*, 358 U.S. at 519.

Kaiser also argues that ordering it to make the prescribed payments would subject it "to an injury—payment of an unlawful penalty—that the antitrust laws are intended to prevent." (Pet. Br. 17.) Kaiser's assertion of injury, as the Court of Appeals recognized, does not bring its defense within the exception to the *Kelly* rule. (642 F.2d at 1310; Pet. App. 13a.)[21] The *Kelly* exception is limited to court action enforcing the precise conduct made unlawful by the antitrust laws. Kaiser's formulation of the exception would swallow the *Kelly* rule.[22]

In short, requiring Kaiser to make payments to the Funds is not enforcing the precise conduct—the boycott—made unlawful by the Sherman Act. Allowing Kaiser's Sherman Act defense would, in direct conflict with *Kelly*, permit Kaiser to appropriate the services of its employees without paying the agreed compensation.

---

[21] See also *Huge* v. *Long's Hauling Co.*, 590 F.2d 457, 460 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979).

[22] *Kelly* and *Bruce's Juices*, this Court's two most recent decisions on the subject, are illustrative of the narrowness of the exception to the *Kelly* rule. In *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743 (1947), the defendant argued that giving judgment on notes representing the purchase price of goods sold and delivered had the effect of enforcing an allegedly illegal component of the price—the difference between the price charged the defendant buyer and the lower prices charged to competitors. The Court rejected this contention, reasoning that all the "plaintiff must show is the notes which import consideration" and requiring payment of those notes would not involve the Court in enforcing an unlawful price discrimination. *Id.* at 756. In *Kelly*, the defendant argued that a judgment for the plaintiff requiring payment of the purchase price would be enforcing an agreement to fix prices since the object of the defendant's promise to purchase onions and the plaintiff's reciprocal promise not to deliver onions on the futures market was price stabilization. The Court dismissed this contention, saying "it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions . . . ." 358 U.S. at 521.

III. THE COURT OF APPEALS CORRECTLY HELD THAT KAISER'S UNFAIR LABOR PRACTICE DEFENSE IS WITHIN THE LABOR BOARD'S EXCLUSIVE JURISDICTION

In addition to its antitrust defense, Kaiser resisted the Trustees' claim for delinquent contributions on the ground that the purchase-of-coal clause violates § 8(e) of the NLRA, 29 U.S.C. § 158(e) (1976). Apart from being foreclosed by the principles of *Benedict*, this defense was properly rejected by the Court of Appeals on the ground that it charges an unfair labor practice within the exclusive jurisdiction of the NLRB. (642 F.2d at 1313-18; Pet. App. 19a-30a.)

The Court of Appeals' ruling is a correct application of the exclusive jurisdiction doctrine articulated by this Court in *Garner* v. *Teamsters Local 776*, 346 U.S. 485 (1953), and *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959). Contrary to Kaiser's claim, nothing in the language or legislative history of § 8(e) indicates that Congress intended to create a unique unfair labor practice that would be adjudicated by the courts instead of the NLRB. Kaiser's argument that judicial determination of its unfair labor practice defense is justified under the rationales of *Connell Constr. Co.* v. *Plumbers Local 100*, 421 U.S. 616 (1975), and *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962), is also unfounded. Finally, Kaiser's meritless claim that § 8(e), if construed consistently with the doctrine of exclusive NLRB jurisdiction, renders the national labor laws unconstitutional, should not be considered by this Court since it was neither raised before nor considered by the District Court or the Court of Appeals.

A. The NLRB Exclusive Jurisdiction Doctrine Is Squarely Applicable

Kaiser's § 8(e) defense is squarely within the NLRB's exclusive unfair labor practice jurisdiction, as recognized by the decisions of this Court.

This Court's first major decision on judicial authority to remedy activity prohibited by § 8 of the NLRA was *Garner* v. *Teamsters Local 776, supra.* A Teamsters local engaged in picketing of trucking companies whose employees were not members of the union, allegedly to coerce these companies "into compelling or influencing their employees to join the union." *Id.* at 487. If the companies' allegations were true, then the union's conduct violated both the Pennsylvania Labor Relations Act and § 8(b)(2) of the NLRA. This Court ruled that the Pennsylvania courts lacked power to enjoin the picketing because the NLRB has exclusive jurisdiction to adjudicate and remedy conduct that violates § 8:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so." *Id.* at 490-91.

Thus, the Court recognized that Congress' commitment of authority for hearing and resolving unfair labor practice charges to a specialized, expert tribunal bars the state and federal courts from adjudicating such charges.

The Court's classic statement of the NLRB exclusive jurisdiction doctrine was articulated in *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959): "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of . . . interference with national policy is to be averted." *Id.* at 245. Uniform development of the national labor policy ordained by Congress, the Court reasoned, requires that the Board and not the courts determine whether disputed activity is protected by § 7, prohibited by § 8, or unregulated by the Act. *Id.* at 244-46. In short, the Board has exclusive jurisdiction to determine whether an unfair labor practice has been committed and to remedy practices found to be unfair under § 8.

Kaiser argues that the exclusive jurisdiction doctrine is inapplicable because its unfair labor practice claim is being raised defensively, and not in a suit for affirmative relief. (Pet. Br. 32-35.) The proposed distinction is untenable and finds no support in the cases or in the doctrinal foundations of the NLRB exclusive jurisdiction principle. The risks to uniform and expert development of national labor policy are not lessened when it is at the instance of the defendant, rather than the plaintiff, that courts decide, independently of the Board, whether conduct is protected by § 7 or unfair under § 8.[23]

This Court has refined the *Garmon* doctrine so as to permit, under some circumstances, a party with no method

---

[23] See cases cited in note 25, *infra*. None of the cases discussed or cited by Kaiser in advancing its proposed distinction between remedies and defenses (Pet. Br. 32-35) involved resolution of questions (such as an unfair labor practice claim) that Congress has exclusively committed for decision to an expert administrative tribunal. *E.g.*, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979) (determining whether § 206 and § 215 of the Investment Advisers Act of 1940 create a private cause of action for damages); *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 635-36 n.6 (1977) (plurality opinion) (noting that state courts have jurisdiction over federal antitrust defenses).

of invoking the jurisdiction of the Board to obtain judicial regulation of conduct arguably prohibited by § 8. *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180, 197 (1978). However, this Court has never wavered from the principle that where the controversy presented to the court involves arguably prohibited conduct and that controversy is "identical to . . . that which could have been, but was not, presented to the Labor Board," the "risk of interference with the unfair labor practice jurisdiction of the Board" requires the court to abstain from independently resolving the dispute. *Id.*

Kaiser's § 8(e) defense is a claim that the union committed an unfair labor practice by entering into a hot cargo agreement and that consequently that agreement is unenforceable. This is a complex factual and legal question squarely within the Board's unfair labor practice jurisdiction. Kaiser could have presented this precise controversy to the Board by filing an unfair labor practice charge, but chose not to do so.[24] Instead, Kaiser sought to have the courts determine, independently of the Board, the lawfulness of the purchase-of-coal clause under § 8(e), a course that would thwart Congress' intent to entrust the NLRB with responsibility for shaping and applying a uniform interpretation of the national labor laws.[25]

---

[24] Perhaps Kaiser chose this course because it doubted that the Board would find the charge meritorious, since a predecessor clause has been upheld by the Board and a successor clause in the 1978 Agreement has been found lawful by the General Counsel. *UMW (Dixie Mining Co.)*, 188 NLRB 753 (1971); *UMW (Consolidated Coal Co.)*, Case No. 6-CE-17 (1979).

[25] The lower courts have repeatedly applied the exclusive jurisdiction doctrine to hold that the federal courts may not decide, independently of the Board, the merits of a § 8(e) defense in a suit for enforcement of a collective bargaining agreement. *Waggoner* v. *Northwest Excavating, Inc.*, 642 F.2d 333, 338 n.2 (9th Cir. 1981); *Orange Belt Painters No. 48* v. *Maloney Specialties, Inc.*, 639 F.2d 487, 491 (9th Cir. 1980); *Waggoner* v. *R. McGray, Inc.*, 607 F.2d 1229, 1235 (9th Cir. 1979); *Huge* v. *Long's Hauling Co.*, 590 F.2d 457, 461 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979); *Mul-*

B. The Language and History of § 8(e) Support Application of the NLRB Exclusive Jurisdiction Doctrine

As Kaiser recognizes, the language of § 8(e) provides that "[i]t shall be an unfair labor practice" to enter into a hot cargo agreement. Kaiser contends, however, that the additional statutory language providing that "any contract or agreement entered into heretofore or hereafter containing such an [illegal hot cargo clause] shall be to such extent unenforcible and void" results in the creation of a unique, unfair labor practice that the courts as well as the NLRB have the power to adjudicate. (Pet. Br. 35.) Thus, Kaiser argues that even if the exclusive jurisdiction doctrine would apply and bar Kaiser's unfair labor practice defense if it were asserting

---

lins v. *Reitz Coal Co.*, 105 LRRM 2776, 2780 (D.D.C. 1979); *Lewis* v. *Seanor Coal Co.*, 256 F. Supp. 456, 460 (W.D. Pa. 1966), *aff'd*, 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968); see *New Mexico Carpenters* v. *Mayhew Co.*, No. 79-1639, slip op. at 4 (10th Cir. June 24, 1981) ("[a]n unfair labor practice, in this case only a possibility, does not constitute a ground on which a court hearing a § 301 action can find an agreement unenforceable"); *Trust Fund Services* v. *Heyman*, 15 Wash. App. 452, 550 P.2d 547, 549-50 (1976) *aff'd*, 88 Wash. 2d 698, 565 P.2d 805, *cert. denied*, 434 U.S. 987 (1977). Kaiser argues that its position is supported by *Perma-Line Corp.* v. *Sign Pictoral Union, Local 230*, 639 F.2d 890 (2d Cir. 1981); *Frito-Lay, Inc.* v. *Retail Clerks Local 7*, 629 F.2d 653 (10th Cir. 1980); *United Optical Workers Local 4708* v. *Sterling Optical Co.*, 500 F.2d 220 (2d Cir. 1974); *Lewis* v. *Seanor Coal Co.*, 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968); and *Todd Shipyards Corp.* v. *Indus. Marine Workers Local 39*, 344 F.2d 107 (2d Cir. 1965). (Pet. Br. 39-41 & n.n.74-76.) In *Frito-Lay, Inc.* and *United Optical Workers Local 4708*, the courts never reached or decided the question. In *Seanor*, the District Court found the employer's § 8(e) defense to be within the exclusive jurisdiction of the Board, 256 F. Supp. 456, 460, and the Third Circuit did not reach the question. *Perma-Line* did not discuss the exclusive jurisdiction doctrine, although it did hold that in an action to confirm an arbitrator's award a court may decide whether a contract violates §§ 8(a)(3) and 8(b)(2) of the NLRA. *Todd*, a case supportive of Kaiser's position, rested on a misapplication of the then-recent decision in *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962). See p. 35, *infra*.

a violation of some other subsection of § 8, the "unenforcible and void" language of § 8(e) permits the courts to resolve 8(e) claims without a determination from the NLRB in the first instance. (Pet. Br. 35-41.)[26]

Kaiser misreads the "unenforcible and void" language of § 8(e). That language was not intended to import into § 8(e) a separate enforcement mechanism independent of proceedings before the Board. Instead, that language was used to make enforcement of hot cargo agreements, whenever executed, an unfair labor practice subject to the exclusive jurisdiction of the Board and to describe the status of agreements after the NLRB has determined them to be within the proscription of § 8(e). The history of § 8(e) makes this clear.

In 1947, Congress passed the Taft-Hartley Act, adding § 8(b)(4)(B) to the NLRA, 29 U.S.C. § 158(b)(4)(B), which makes it an unfair labor practice for a labor organization, by strike or similar means, to coerce a neutral employer in order to put pressure on another employer with whom the union has a dispute. *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612 (1967). Section 8(b)(4)(B), however, does not make it unlawful for a union and an employer to enter into an agreement which has these secondary effects. *Local 1976, United Bhd. of Carpenters* v. *NLRB* (*Sand Door*), 357 U.S. 93 (1958).

---

[26] In reaching that conclusion, Kaiser also relies on several statements in the legislative history of § 8(e). (Pet. Br. 36-37 n.68.) Most of those statements simply reiterate the statutory language and are fully consistent with application of the exclusive jurisdiction doctrine. In addition, Kaiser quotes a post-enactment statement by Senator Goldwater. (*Id.* at 38 & n.70.) Such a post-passage remark represents only the personal view of the legislator and is entitled to no weight. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 639 n.34 (1967). In any event, Senator Goldwater's statement does not address the issue of who determines whether a clause violates § 8(e), but rather says only that an unlawful clause may not be a basis for damages or equitable relief. It is accordingly not relevant to the applicability of the exclusive jurisdiction doctrine.

In 1959, Congress enacted the Labor-Management Reporting and Disclosure Act ("LMRDA") and plugged this "loophole" in the law of "secondary boycotts" by adding § 8(e) of the NLRA.

Section 8(e) was first introduced as an amendment to the Senate bill by Senator Gore. 105 Cong. Rec. S5887-89 (daily ed. April 23, 1959), *reprinted in* II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 ("Leg. Hist.") at 1161-63 (1959). Senator Gore explained that "[t]he purpose of the amendment is to declare and make it 'an unfair labor practice' " to enter into a hot cargo agreement. *Id.* at 1163. Senator Kennedy, a principal sponsor of the Act and supporter of the amendment, suggested that the Senate consider requiring the Board to give priority "to the handling of unfair labor practices arriving under this provision." *Id.* Senator Gore's and Senator Kennedy's statements make clear that when § 8(e) was introduced the intention was simply to add entering into a hot cargo agreement to the list of unfair labor practices defined in § 8 and regulated by the Board. There was no intention to create a unique unfair labor practice cognizable in the courts.

This original intention did not change when, two days later, Senator Smathers, on behalf of himself and Senator Long, proposed that Senator Gore's amendment be supplemented with the following provision:

> "Any contract between an employer and a labor organization or its agents heretofore or hereafter executed which is, or which calls upon anyone to engage in, an unfair labor practice under section 8(e) of the National Labor Relations Act, as amended, shall to such extent be unenforceable and void." 105 Cong. Rec. S6033 (daily ed. April 25, 1959), *reprinted in* II Leg. Hist. 1242.

Senator Smathers introduced this amendment as part of a package that also brought § 8(e) violations within the ambit of § 10(l) of the NLRA, 29 U.S.C. § 160(l), which instructs the NLRB to give priority to certain specified unfair labor practice charges and authorizes it

to seek temporary injunctive relief in the courts pending final Board adjudication whenever it has reasonable cause to believe such a charge is true. Senator Smathers explained the purpose of his amendment:

> "In the original amendment offered by the able junior Senator from Tennessee [Senator Gore], *it was made an unfair labor practice for there to be put into a contract to be entered into a hot-cargo clause.* The amendment which has been proposed by me and the junior Senator from Louisiana would provide that the *same prohibition should apply to contracts now in existence.* . . . [It] would [also] make such unfair labor practices subject to the mandatory injunction provisions of section 10(l). . . ." *Id.* (emphasis supplied).

Senator Smathers' amendment was thus an effort to close a loophole remaining in Senator Gore's proposal that "enter[ing] into" a hot cargo agreement be made an unfair labor practice. Senator Gore's proposal could have been interpreted as not proscribing enforcement of hot cargo contracts "enter[ed] into" either (a) prior to enactment of the LMRDA, even though prohibiting the Teamsters from enforcing such agreements was the principal impetus for the legislation, *id.*, or (b) after enactment, but outside the six-month statute of limitations for unfair labor practices, 29 U.S.C. § 160(b).

To ensure that enforcement of a hot cargo contract, whenever executed, would be subject to the NLRB's unfair labor practice jurisdiction, Congress accepted the Smathers' amendment and declared that any agreement "entered into heretofore or hereafter containing such [a hot cargo clause] shall be to such extent unenforcible and void. . . ." 29 U.S.C. § 158(e).[27] There is no legis-

---

[27] The initial Senate bill was limited to the motor carrier industry. After the Senate bill passed, the House passed a bill prohibiting all hot cargo agreements, not just those in the motor carrier industry. H.R. Rep. No. 1147, 86th Cong., 1st Sess. 38 (1959), *reprinted in* I Leg. Hist. 943. The language enacted as § 8(e) was subsequently drafted in the Senate to cover all hot cargo

lative history indicating that Congress intended by adoption of this language to remit responsibility for adjudicating such unfair labor practices to the courts, rather than lodging it in the Board.[28] That Congress intended determination and remediation of § 8(e) claims to be committed exclusively to the Board is also supported by the other enacted feature of the Smathers amendment package, which amended § 10(l) so as to direct the Board to give priority to § 8(e) charges and to seek immediate injunctive relief if it has reasonable cause to believe that a § 8(e) charge is meritorious.[29]

---

agreements not specifically excepted. 105 Cong. Rec. S15906 (daily ed. Aug. 28, 1959), *reprinted in* II Leg. Hist. 1383.

[28] Decisions of the Board and the courts following on the heels of enactment of § 8(e) confirm that the "unenforcible and void" language was included to ensure that enforcement of a hot cargo agreement, whenever executed, would be within the unfair labor practice jurisdiction of the Board. In *Dist. No. 9, Int'l Ass'n Machinists* v. *NLRB*, 315 F.2d 33, 35 (D.C. Cir. 1962), *enf'g* 134 NLRB 1354 (1961), the court, speaking through Judge Fahy, affirmed the Board's determination that enforcement of a hot cargo agreement executed prior to the effective date of § 8(e) is an unfair labor practice: "Since agreements condemned by section 8(e) are declared to be 'unenforcible and void,' to reinstate an earlier one, as was here done, is in substance to enter into it. Accordingly, we accept the Board's position on this branch of the case." *Accord, Los Angeles Mailers Union No. 9* v. *NLRB*, 311 F.2d 121, 125 (D.C. Cir. 1962) *enf'g* 135 NLRB 1132 (1962) (enforcement of a hot cargo agreement executed after the effective date of § 8(e) is an unfair labor practice); see also *Bricklayers Union* v. *NLRB*, 562 F.2d 775, 781-83 (D.C. Cir. 1977) (acts of continued enforcement of a hot cargo agreement constitute an unfair labor practice within the statute of limitations).

[29] Congress' intent not to except § 8(e) from the NLRB's exclusive jurisdiction is also evidenced by the fact that it acted specifically in the LMRDA to remedy perceived problems arising from that exclusive jurisdiction. Congress added § 14(c) to the NLRA, 29 U.SC. § 164(c), which authorizes the Board to decline jurisdiction, *inter alia*, over limited classes of unfair labor practice disputes and, upon such declination, preserves the right of state agencies and courts to assume jurisdiction of the dispute. This legislative context emphasizes that Congress would have expressly

C. Application of the Exclusive Jurisdiction Doctrine to Kaiser's § 8(e) Defense Is Consistent with this Court's Decisions in *Connell* and *Lucas Flour*

Kaiser argues that the principles articulated in this Court's opinions in *Connell Constr. Co.* v. *Plumbers Local 100*, 421 U.S. 616 (1975), and *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962), permit judicial determination of its § 8(e) defense. Kaiser misreads those cases.

1. *The* Connell *Decision*

In *Connell*, an employer filed suit against a union seeking a determination that an agreement that it had signed under duress violated the Sherman Act. The union defended on the ground that its conduct was protected from the antitrust laws by the "construction industry proviso" to § 8(e), which specifically authorized the agreement at issue. This Court ruled that the union's defense was cognizable in federal court because "the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws." 421 U.S. at 626 (footnote omitted). Kaiser argues that this principle gives the federal courts jurisdiction over its § 8(e) defense. (Pet. Br. 41.)

Kaiser's argument, however, fails to recognize that the "collateral" labor issue resolved in *Connell* was quite different from the issue Kaiser is asking the courts to resolve. In *Connell*, the union was not claiming that an unfair labor practice had been committed; it was assert-

---

excepted § 8(e) from the NLRB's exclusive jurisdiction had that been its intent.

Moreover, Congress in 1959 did not amend § 303 of the LMRA, 29 U.S.C. § 187, to provide a damages remedy for violation of § 8(e). See *Atchison, T. & S.F. Ry.* v. *Local 70, Teamsters*, 511 F.2d 1193, 1195 (9th Cir. 1975) (per curiam). As the Court of Appeals noted, "When Congress has spoken so directly on the remedies to be provided for statutory violations, it is not for the courts to add remedies [*i.e.*, contract avoidance] of their own." (642 F.2d at 1313; Pet. App. 21a.)

ing that its conduct, which otherwise was *concededly* unlawful under § 8(e),[30] was affirmatively protected by the construction industry proviso. Brief for Respondent at 10-11, *Connell Constr. Co.* v. *Plumbers Local 100.* The question raised by the union could not have been addressed by the NLRB because the Board does not have jurisdiction to decide the scope of § 8(e) absent a charge that an unfair labor practice has occurred. *NLRB* v. *Indiana & Michigan Elec. Co.*, 318 U.S. 9, 17-18 (1943). As a consequence, there was no mechanism for obtaining an NLRB determination of the "collateral" labor law issue before the Court in *Connell.* See *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. at 197, 202-03; *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 687 (1965) (opinion of White, J.). Kaiser, however, could have filed a charge with the Board seeking a determination that the purchase-of-coal clause violates § 8(e). Where the precise labor law issue a party requests the courts to resolve could be presented to the Board pursuant to its unfair labor practice jurisdiction, the exclusive jurisdiction doctrine requires that it *must* be presented to the Board, not the courts.[31] *E.g., Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. at 197.

---

[30] The Court in *Connell* did *not* decide that the union violated § 8(e). Rather, the parties and the Court *assumed* that if the union's conduct was not sheltered by the proviso, it was violative of § 8(e). The labor law issue decided by the Court in *Connell* was a purely legal one involving the meaning of the construction industry proviso. By contrast, the issue Kaiser asks the courts to decide is whether entering into the 1974 Agreement was an unfair labor practice and that involves complex factual questions calling for application of the Board's specialized expertise. See, *e.g., NLRB* v. *Int'l Longshoremen's Ass'n*, 447 U.S. 490 (1980).

[31] Kaiser also relies heavily on a statement in a footnote to Justice Stewart's dissenting opinion in *Connell* (Pet. Br. 39), where he remarked that a signatory employer of a voluntary agreement violative of § 8(e) is "protected from any damage that might result from the illegal 'hot cargo' agreement by his ability to simply ignore the contract provision that violates § 8(e)." 421 U.S. at 649-50 n.9. This dictum is not on point. Justice Stewart's remark concerned agreements violative of § 8(e), not the logically

2. *The Principle of* Lucas Flour

Relying on *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 101 n.9 (1962), Kaiser argues that the NLRB exclusive jurisdiction doctrine is inapplicable here because this case was brought pursuant to § 301 of the LMRA to enforce a collective bargaining agreement. (Pet. Br. 42.)[32] *Lucas Flour*, as well as many other decisions (*e.g.*, *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 197 (1962); *Atkinson* v. *Sinclair Ref. Co.*, 370 U.S. 238, 245 n.5 (1962)), stand for the proposition that federal courts are not precluded from deciding contract claims in § 301 suits simply because the breach, if proven, might *also* be an unfair labor practice. See *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. at 189 n.14. The courts in these cases were not asked to determine whether certain conduct constituted an unfair labor practice, but only whether a contract had been breached, a matter § 301 grants the federal courts unquestioned jurisdiction to decide. Here, on the other hand, Kaiser seeks to have the courts determine whether entering into the 1974 Agreement constituted an unfair labor practice under § 8(e), a matter squarely within the Board's exclusive jurisdiction.[33]

---

prior question of who initially determines whether a § 8(e) unfair labor practice has occurred. Moreover, even if Justice Stewart's remark was meant to extend to contracts arguably proscribed by § 8(e) but not found to be unlawful by the Board, certainly it does not mean that an employer can "ignore" the agreement after it has been sued on the contract. Here, Kaiser could have sought an NLRB determination that the purchase-of-coal clause violates § 8(e) after the present suit was filed, but chose not to do so.

[32] Kaiser also cites *Vaca* v. *Sipes*, 386 U.S. 171 (1967), where this Court sustained the jurisdiction of courts to adjudicate claims for breach of the union's duty of fair representation. The considerations on which the Court relied in reaching that conclusion are inapposite here. *Id.* at 180-83.

[33] It has been recognized repeatedly that § 301 does not grant the courts jurisdiction over unfair labor practice claims and defenses. *New Mexico Carpenters* v. *Mayhew Co.*, No. 79-1639, slip op. at 4 (10th Cir. June 24, 1981); *Castaneda* v. *Dura-Vent Corp.*, 648 F.2d 612, 616 (9th Cir. 1981); *Orange Belt District Council* v.

D. Kaiser's Argument that the Court of Appeals' Construction of § 8(e) Is Unconstitutional Was Not Raised Below and Is Without Merit

Kaiser contends that § 8(e), if construed consistently with the doctrine of NLRB exclusive jurisdiction, is unconstitutional because it leaves "employers like Kaiser Steel with the prospect that they may be compelled to comply with a contract clause the lawfulness of which *no court* has been able to review." (Pet. Br. 45.) Although the issue whether Kaiser's § 8(e) defense is judicially cognizable was litigated and decided by both the District Court and the Court of Appeals, Kaiser never presented this constitutional argument to those courts. Thus, this Court should not entertain Kaiser's constitutional argument because it was neither raised before nor considered by the District Court or the Court of Appeals. *Miree* v. *DeKalb County*, 433 U.S. 25, 33-34 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957).

In any event, Kaiser's constitutional argument is insubstantial. Section 8 of the NLRA creates no private rights respecting enforcement of the proscription of unfair labor practices. Unfair labor practices are by statute made matters of public concern. The statute sets forth a definite and restricted procedure for determination of these matters. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261 (1940). If the NLRB's General Counsel decides not to issue a complaint, that decision is unreviewable. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138-39 (1975). The constitutionality of the NLRB's exclusive jurisdiction was specifically upheld in *Myers* v.

Maloney Specialties, Inc., 639 F.2d 487, 491 (9th Cir. 1980); *Waggoner* v. *R. McGray, Inc.*, 607 F.2d 1229, 1234-35 (9th Cir. 1979); *Atchison, T. & S.F. Ry.* v. *Local 70, Teamsters*, 511 F.2d 1193, 1195 (9th Cir. 1975); *Pennington* v. *UMW*, 325 F.2d 804, 819 (6th Cir. 1963), *cert. denied*, 381 U.S. 949 (1965). Moreover, in *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 300-01 (1971), this Court recognized, in a different context, that § 301 actions are exempted from the exclusive jurisdiction doctrine only to the extent that courts may decide traditional contract law questions.

Bethlehem Shipbuilding Corp., 303 U.S. 41, 48 (1938). In short, the Act is not designed to provide for individual relief but to protect broader public rights and Congress is constitutionally free to shape those rights by establishing limited procedures for their determination.

Kaiser contends that § 8(e), as interpreted by the Court of Appeals, is unconstitutional because it "intrudes upon the federal courts' ability to decide contract enforcement actions . . . and thus offends the constitutional requirement of the separation of powers." (Pet. Br. 44.) Beyond the fact that Kaiser, as noted, has no private rights respecting enforcement of § 8(e), it is well-recognized that Congress may constitutionally establish exclusive jurisdiction over a particular question in a single forum and deprive federal courts of the power to consider that question when raised by way of defense to suits over which those courts have jurisdiction. *Yakus* v. *United States*, 321 U.S. 414 (1944); *Bowles* v. *Willingham*, 321 U.S. 503 (1944).

IV. THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980 REQUIRES AFFIRMANCE OF THE COURT OF APPEALS' JUDGMENT

Nine days after the Court of Appeals rendered the decision under review, Congress enacted legislation—the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 ("the Multiemployer Pension Act" or "the Act")—that confirms the principles applied by the Court of Appeals and requires affirmance of its judgment.

The overall purpose of the Multiemployer Pension Act, as expressed by the Congress, is to foster the financial soundness and growth of multiemployer pension plans, because "the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans."[34] To achieve

---

[34] Section 3(a)(3), 94 Stat. 1209, 29 U.S.C.A. § 1001a(a)(3) (West Supp. 1976-80). The Funds are "multiemployer pension plans" within the meaning of the Act. Section 207, 94 Stat. 1288, 26 U.S.C.A. § 414(f) (West Supp. 1981).

that purpose, the Act amends ERISA in a number of ways, including the creation of a direct and unambiguous ERISA cause of action for the collection of delinquent contributions by trustees of multiemployer plans. Thus, § 306(a) adds a new § 515 to ERISA which provides:

> "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." 94 Stat. 1295, 29 U.S.C.A. § 1145 (West Supp. 1976-80).[35]

The language and legislative history of § 306(a) make clear that Congress intended § 306(a) to enable multiemployer plans to recover delinquent contributions expeditiously, free of defenses reflecting labor-management disputes over issues such as the legality of the collective bargaining agreement giving rise to the obligation to contribute. That language unambiguously requires employers to make contributions "in accordance with the terms and conditions" of their agreement. The entire legislative history of § 306(a) confirms that Congress' purpose was to preclude "claims and defenses" which are not grounded in the terms and conditions of the agreement—such as the antitrust and § 8(e) defenses Kaiser seeks to raise. Indeed, that history specifically indicates

---

[35] The Solicitor General directed the Court's attention to this recent statute in a letter suggesting that, because § 306(a)—which has not been subject to examination by the lower courts—may bear importantly on the issues in this case and similar cases in the future, the Court should consider dismissing the writ of certiorari as improvidently granted. Letter from Wade H. McCree, Jr., to Alexander L. Stevas (May 27, 1981). Counsel for respondents then wrote the Court supporting the Solicitor General's suggestion, letter from Stephen J. Pollak to Alexander L. Stevas (June 2, 1981), and counsel for petitioner wrote the Court opposing the suggestion, letter from A. Douglas Melamed to Alexander L. Stevas (June 3, 1981). The Court declined to take action as a result of this correspondence. Letter from Alexander L. Stevas to Wade H. McCree, Jr. (June 12, 1981).

that § 306(a) is a statutory endorsement of certain judicial decisions analytically indistinguishable from the Court of Appeals' ruling and an overruling of decisions that have allowed employer defenses analogous to those Kaiser seeks to raise. In accordance with its purpose, § 306(a) permits an employer contractually obligated to contribute to a multiemployer plan to assert only one illegality defense: that the payment would violate § 302 (a) of the LMRA, 29 U.S.C. § 186(a), which proscribes payments by an employer to a representative of his employees in the absence of a qualified trust. That defense is not at issue here. Contrary to Kaiser's contention (letter of June 3, 1981, see note 35, *supra*), § 306 (a) applies to cases pending on the date of enactment, and hence requires affirmance of the Court of Appeals' judgment.

A. The Legislative History of § 306(a) Confirms that Employer Claims and Defenses Not Grounded in the Terms of the Agreement Are Barred

When introduced in Congress, neither the bill that became the Multiemployer Pension Act, H.R. 3904, nor the Senate counterpart, S. 1076, contained any provision relating to recovery of delinquent employer contributions. 125 Cong. Rec. H2677 (daily ed. May 3, 1979); 125 Cong. Rec. S5291 (daily ed. May 3, 1979). During the legislative process, Congress determined that protecting the financial stability of multiemployer plans required addressing the problem of employers failing to make promised contributions to such plans. In April 1980, the Senate Committee on Labor and Human Resources, chaired by Senator Williams, amended S. 1076 to include a delinquent contributions provision essentially identical to that which would be enacted as § 306(a).[36] Senate Labor and Human Resources

[36] This provision was foreshadowed in an earlier bill. See Senate Labor and Human Resources Committee, "S. 209: The ERISA Improvements Act of 1979," 96th Cong., 1st Sess. 45, 124 (unnumbered Comm. Print November 1979) ("1979 Sen. Labor Comm. Print").

Committee, "S. 1076: The Multiemployer Pension Plan Amendments Act of 1980," 96th Cong., 2d Sess. 242 (unnumbered Comm. Print April 1980) ("1980 Sen. Labor Comm. Print"). After noting the serious problems posed for multiemployer plans by "[f]ailure of employers to make promised contributions in a timely fashion" (*id.* at 43), the Committee explained the purpose of this amendment:

> "Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.
>
> "The public policy of this legislation to foster the preservation of the private multiemployer plan system mandates that provision be made to discourage delinquencies and simplify delinquency collection. The bill imposes a Federal statutory duty to contribute on employers that are already contractually obligated to make contributions to multiemployer plans." *Id.* at 44.

On May 22, 1980, the House passed H.R. 3904 without a provision comparable to that in the Senate Labor Committee bill providing for recovery of delinquent contributions. 126 Cong. Rec. H4158 (daily ed. May 22, 1980).

After the House passed H.R. 3904, the Senate Committee on Finance and the Senate Committee on Labor and Human Resources jointly formulated and reported to the Senate a version of S. 1076 which contained the provision of the Senate Labor Committee bill, now § 306(a), designed to prohibit employers from resisting suits for

delinquent contributions to multiemployer pension plans by raising defenses involving complex issues between the employer and the union, such as the alleged unlawfulness of the collective bargaining agreement. 126 Cong. Rec. S10094 (daily ed. July 29, 1980). During Senate floor debate on the joint Finance-Labor bill, Senator Matsunaga (a member of the Finance Committee) and Senator Williams (sponsor, floor manager, and Chairman of the Labor and Human Resources Committee) engaged in a colloquy over the purpose of § 306(a):

> "Mr. MATSUNAGA. If I may pose a further question, in some recent cases such as the Washington Area Carpenters Fund Overhead Door Co. case, a simple collection action brought by plan trustees has been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise of contributions and the plan's entitlement to the contributions. Would the bill correct this situation?
>
> "Mr. WILLIAMS. I feel that it would correct the situation. It is essential to the financial health of multiemployer plans that they and their actuaries be able to rely on an employer's contribution promises.
>
> "Further, plan participants for whom the employer promises to make pension contributions to the plan in exchange for their labor are entitled to rely on their employer's promises. The bill clarifies the law in this regard by providing a direct ERISA cause of action against a delinquent employer without regard to extraneous claims or defenses." 126 Cong. Rec. S10102 (daily ed. July 29, 1980).[37]

The bill passed the Senate the same day. *Id.* at S10169.

On August 25, 1980, the House debated whether to accede to the Senate substitute bill. 126 Cong. Rec.

---

[37] Statements of legislative sponsors are entitled to substantial weight in interpreting a statute. *Simpson* v. *United States*, 435 U.S. 6, 13 (1978); *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 640 (1967); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 455-56 (1957).

H7863-7910 (daily ed. Aug. 26, 1980). During that debate Rep. Thompson (sponsor, floor manager, and chairman of the responsible House subcommittee) explained the purpose and meaning of § 306(a):

> "Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law—other than 29 U.S.C. 186. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.
>
> "In this regard we endorse judicial decisions such as *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir., 1962); and *Huge* v. *Long Hauling Company, Inc.*, 590 F.2d 457 (3rd Cir., 1978). Cases such as *Western Washington Laborers-Employers Health and Security Trust Funa* v. *McDowell*, —— F. Supp. ——, 103 LRRM 2219 (W.D. Wash., 1979) and *Washington Area Carpenters Welfare Fund, et al.* v. *Overhead Door Company*, C.A. No. 79-0097, USDC D.C., April 22, 1980, are considered to have been incorrectly decided and this legislation is intended to clarify the law in this respect by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer." 126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980).

With certain amendments not relevant here, the House adopted the Senate substitute, including the delinquent contributions provision. 126 Cong. Rec. H7910 (daily ed. Aug. 26, 1980).

On August 26, 1980, the Senate considered the House amendments to the Senate substitute. During the floor debate, Floor Manager Williams explained the purpose of § 306(a) in the same terms as Rep. Thompson. 126 Cong. Rec. S11673 (daily ed. Aug. 26, 1980). Without further change of consequence here, the bill passed the Senate on September 18, 1980, 126 Cong. Rec. S12901 (daily ed. Sept. 18, 1980), and the House on the following day, 126 Cong. Rec. H9179 (daily ed. Sept. 19, 1980). President Carter signed it into law on September 26, 1980.

B. The Endorsement and Disapproval of Specific Judicial Decisions in the Legislative History Confirm that § 306(a) Precludes Kaiser's Antitrust and § 8(e) Defenses

Sen. Williams and Rep. Thompson explained the purpose of § 306(a) in part by referring to several judicial decisions analytically indistinguishable from the case at bar. They said that § 306(a) represents a legislative endorsement of *Lewis* v. *Benedict Coal Corp.*, *supra*, and *Huge* v. *Long's Hauling Co.*, *supra*, and a statutory overruling of *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.*, 488 F.Supp. 816 (D.D.C. 1980), *appeal pending*, (D.C. Cir. No. 80-1501), and *Western Washington Trust Fund* v. *McDowell*, 103 LRRM 2219 (W.D. Wash. 1979), *appeal pending*, (9th Cir. No. 80-3024).[38]

The Court of Appeals' refusal to entertain Kaiser's illegality defenses rests on the principles of *Benedict* and *Long's Hauling*. On the other hand, the disapproved

[38] See also 1980 Sen. Labor Comm. Print 44; 126 Cong. Rec. S10102 (daily ed. July 29, 1980) (colloquy between Sen. Matsunaga and Sen. Williams). The sponsors also expressly approved *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962), *aff'g* 188 F.Supp. 4 (E.D. Ky. 1960), where it was held that *Benedict* precludes an employer from defending a pension plan's claim for delinquent royalties on the ground that the agreement providing for payments is void for want of consideration due to misconduct by the trustees of the plan.

Overhead Door and *McDowell* cases recognized the *Higdon* defense, which, like the antitrust and labor law defenses Kaiser seeks to raise, is a challenge to the very agreement under which collection is being sought. See p. 3 & n. 12, *supra*. The explicit legislative references to these decisions underscore that § 306(a) precludes Kaiser's antitrust and § 8(e) defenses.

C. Under § 306(a), the Only Permissible Illegality Defense Is That Payment Would Violate § 302 of the LMRA

Apart from legitimate disputes over whether an employer is in breach of a contractual obligation to make contributions to a multiemployer plan, § 306(a) permits only one defense to be raised in suits to recover delinquent contributions: that the payment of such contributions would be "inconsistent with law." Kaiser has not asserted such a defense.

During final floor debate on the legislation, Sen. Williams and Rep. Thompson carefully explained the intent of § 306(a): "Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law—other than 29 U.S.C. 186." 126 Cong. Rec. S11673 (daily ed. Aug. 26, 1980) (remarks of Sen. Williams); 126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) (remarks of Rep. Thompson).[39] Thus, under § 306(a), the only illegality defense permitted is one based on 29 U.S.C. § 186—*i.e.*, § 302 of the LMRA.

Such a defense differs fundamentally from the defenses Kaiser seeks to raise. Section 302(a) of the LMRA generally prohibits an employer from making payments to any representative of his employees. *NLRB* v. *Amax Coal Co.*, No. 80-692, 49 U.S.L.W. 4880, 4882 (June 12, 1981). However, § 302(c)(5) expressly excepts from the general proscription of § 302(a) employer contributions to an employee benefit fund that meets

[39] See also 1979 Sen. Labor Comm. Print 45, 124.

specified requirements. The strict requirements on employee trust funds imposed by § 302(c)(5) are designed to ensure that employer contributions are used for the sole and exclusive benefit of the employees, their families, and dependents. Congress intended to allow § 302 of the LMRA to be asserted in defense to a trustee collection suit because where meritorious the defense would render inapplicable Congress' purpose to foster the growth and stability of qualified employee trust funds. Thus, Congress carefully drafted § 306(a) to ensure that trust funds satisfying the strictures of § 302(c)(5) (as the Funds administered by the Trustees do (J.A. 28)) could collect delinquent contributions unencumbered by defenses arising out of employer-union disputes.

The language of § 306(a) reflects the distinction between the defenses Kaiser seeks to raise and the narrow defense permitted by Congress. The text of § 306(a) provides that every employer obligated by a plan or collective bargaining agreement to make contributions to a multiemployer plan "shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." This language must be parsed carefully. It does *not* say that every employer contractually obligated to contribute to a multiemployer plan shall make such contributions in accordance with the *lawful* terms and conditions of such agreement. Only if the act of making contributions is itself "inconsistent with law" (*i.e.*, violative of § 302(a) of the LMRA) may an employer defend failure to make promised contributions. Kaiser's performance of its contractual obligation to pay royalties to the Funds would not be "inconsistent with law" within the meaning of that phrase in § 306(a), and accordingly such performance is required by § 306(a) of the Multiemployer Pension Act.[40]

---

[40] For an example of a dispute that would not be foreclosed by § 306(a) of the Multiemployer Pension Act, see *Walsh* v. *Schlecht*, 429 U.S. 401 (1977) (rejecting employer's argument that payment to employee benefit fund would violate § 302(a) of the LMRA).

D. Section 306(a) Applies to Pending Cases

Kaiser contends that § 306(a) does not apply to the case at bar (letter of June 3, 1981, see note 35, *supra*). It is well-settled, however, that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley* v. *Richmond School Bd.*, 416 U.S. 696, 711 (1974). *Accord, Cort* v. *Ash*, 422 U.S. 66, 76-77 (1975); *Thorpe* v. *Housing Auth.*, 393 U.S. 268, 281-83 (1969). The three narrow exceptions articulated in *Bradley* do not apply here, and accordingly § 306(a) must be applied by this Court in deciding this case.

Respecting "statutory direction," nothing in the Multiemployer Pension Act suggests that § 306(a) should not apply to cases pending on the date of its enactment. Kaiser suggests that § 108(c) provides otherwise (letter of June 3, 1981, see note 35, *supra*). On the contrary, that section simply provides that the amendments to ERISA made by the Act shall, with certain exceptions not relevant here, take effect on the date of enactment of the amendments. 94 Stat. 1267. Such a provision, however, does not bear on the question whether, once effective, the statute governs pending cases. See, *e.g.*, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 164-65 (1975) (statute which Congress provided would take effect at a specified date after enactment applies to case instituted prior to enactment but pending on appeal after the statute's effective date); *Bradley*, 416 U.S. at 711-15 (same).

Similarly, nothing in the "legislative history" of § 306(a) indicates that it was intended not to apply to pending cases. On the contrary, the sponsors of the legislation, in explaining the purpose of § 306(a), expressly disapproved pending decisions, indicating that the provision was specifically intended to apply to cases still on appeal. 126 Cong. Rec. S11673 (daily ed. Aug. 26, 1980) (remarks of Sen. Williams); 126 Cong. Rec.

H7899 (daily ed. Aug. 26, 1980) (remarks of Rep. Thompson).[41]

Finally, application of § 306(a) to this case would not result in "manifest injustice." This Court has made clear that the important considerations in determining whether application of a new statute to a pending case would result in "manifest injustice" are the nature of the parties and the rights affected by the new law and the impact the law has on those rights. *Bradley*, 416 U.S. at 716-21. Section 306(a) involves matters of great national concern: "Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises." 126 Cong. Rec. S11673 (daily ed. Aug. 26, 1980) (remarks of Sen. Williams); 126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) (remarks of Rep. Thompson). As Chief Justice Marshall noted, "in great national concerns . . . the court must decide according to existing laws. . . ." *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801), *quoted in Bradley*, 416 U.S. at 719. Moreover, no "new and unanticipated obligations [would] be imposed" upon Kaiser by application of § 306(a). *Bradley*, 416 U.S. at 720. Kaiser, a signatory to the 1974 Agreement, has long been aware of its obligation thereunder and prior to passage of § 306(a) two federal courts applied established legal principles to enforce Kaiser's promise.

In short, this case presents no cause for departure from the venerable rule that this Court will apply the

---

[41] They expressly disapproved *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.*, 488 F.Supp. 816 (D.D.C. 1980), *appeal pending*, (D.C. Cir. No. 80-1501, docketed May 9, 1980), and *Western Washington Trust Fund* v. *McDowell*, 103 LRRM 2219 (W.D. Wash. 1979), *appeal pending*, (9th Cir. No. 80-3024, docketed Jan. 11, 1980). (On June 12, 1981, the D.C. Circuit, *sua sponte*, ordered the *Overhead Door* appeal stayed pending this Court's decision in the case at bar. The *McDowell* case has been argued and submitted to the Ninth Circuit.)

law in effect at the time of its decision.[42] Accordingly, § 306(a) applies and precludes in this suit to recover delinquent pension fund contributions Kaiser's defense that the 1974 Agreement requiring those contributions is unlawful.

V. THE AWARD OF ATTORNEYS' FEES IS AUTHORIZED BY ERISA

Kaiser argues that the award of attorneys' fees to the Trustees lacked statutory authorization, that the only jurisdictional basis for this suit is § 301 of the LMRA, which does not authorize an award of attorneys' fees. (Pet. Br. 47-49.) Kaiser is wrong; the award is authorized by ERISA.

This case was brought by the Trustees both under § 301 of the LMRA and § 502 of ERISA. (J.A. 11.) Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3) (1976), provides that a civil action may be brought

> "by a . . . fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

Section 502(g) of the Act in turn authorizes the district court to award attorneys' fees "[i]n any action under this subchapter by a . . . fiduciary." 29 U.S.C. § 1132(g) (1976).

Kaiser argues that this action does not properly arise under ERISA because, in Kaiser's view, this action was

---

[42] This Court has already indicated that the Multiemployer Pension Act applies to cases pending on appeal after its enactment, as it recently relied on the Act to reverse a decision rendered prior to the Act's passage. In *NLRB* v. *Amax Coal Co.*, No. 80-692, 49 U.S.L.W. 4880 (June 29, 1981), this Court expressly relied on the Act in reversing a Third Circuit decision that "runs afoul of express congressional policy favoring multiemployer trusts." 49 U.S.L.W. at 4885 n.22. See also *Trustees, Local 387 Pension Fund* v. *Southern Stress Wire Corp.*, 509 F. Supp. 1097, 1104-05 (N.D. Ga. 1981) (applying § 306(a) in a case filed prior to its enactment).

not brought to enforce "either ERISA itself or the provisions of a pension plan" but only to enforce a collective bargaining agreement. (Pet. Br. 48.) This case was brought to enforce the UMW Benefit and Pension Plans. Article XX of the 1974 Agreement incorporates each of the four Plans (J.A. 28-29) and each of the four Plans in turn states that it was established "pursuant to Article XX of the Wage Agreement" and otherwise makes clear that employers were to fund the Plans according to Article XX's terms.[43] Thus, in failing to make the contributions called for by the purchase-of-coal clause, Kaiser violated not only the 1974 Agreement but also the Plans. Indeed, there can hardly be any more central or significant term of a multiemployer benefit plan than the term that provides for the payment of contributions and sets forth the manner in which the amount of each participating employer's contributions shall be determined. Numerous courts have awarded attorneys' fees in recognition that suits like this arise under ERISA.[44]

In addition, this suit was brought to enforce ERISA itself. *Huge* v. *Old Home Manor, Inc.*, 419 F.Supp. 1019 (W.D. Pa. 1976). The Act expressly requires trustees to discharge their fiduciary duties with the care and skill of a "prudent man." 29 U.S.C. § 1104(a)(1)(B). This standard imposes a duty on the Trustees to maximize the Funds' assets and requires them to institute litigation when necessary to collect delinquent contributions. See *Nedd* v. *UMW*, 556 F.2d 190 (3d Cir. 1977),

---

[43] In addition, two of the Plans, the 1950 and 1974 Pension Plans, expressly state that "[c]ontributions to the [pension trusts] to fund the benefits under this Plan shall be paid solely by the Employers in accordance with Article XX of the Wage Agreement." The four Plans are not in the record because Kaiser did not oppose in the District Court the Trustees' request for attorneys' fees in their complaint and motion for summary judgment. (J.A. 14, 66.) Because Kaiser did not contest this issue in the District Court, respondents submit that it should not be considered here. *Cf. Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2, 157 n.16 (1970).

[44] See, *e.g.*, the cases cited by the Court of Appeals. (642 F.2d at 1320 n.14; Pet. App. 34a n.14).

cert. denied, 434 U.S. 1013 (1978). The Act also precludes trustees from extending credit to a "party in interest," 29 U.S.C. § 1106(a)(1)(B), defined to include an employer with employees covered by an ERISA plan, 29 U.S.C. § 1002(14). Had they failed to institute this suit, the Trustees would have risked violating this proscription.

Finally, § 306 of the Multiemployer Pension Act, 94 Stat. 1295, amends ERISA so as expressly to authorize the award of attorneys' fees in suits to recover contributions to a multiemployer plan pursuant to the terms of a collectively bargained agreement. 29 U.S.C.A. §§ 1145 and 1132(g)(2)(D) (West. Supp. 1976-80). This statute applies to the present case (pp. 46-48, *supra*) and hence provides a further ground for affirmance of the attorneys' fee award.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

E. CALVIN GOLUMBIC
WALTER P. O'CONNELL
United Mine Workers of America Health and Retirement Funds
2021 K Street, N.W.
Washington, D.C. 20006
(202) 452-5000

STEPHEN J. POLLAK *
RALPH J. MOORE, JR.
WENDY S. WHITE
JEFFREY C. MARTIN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for Respondents

* Counsel of Record

August 31, 1981

APPENDICES

APPENDIX A

Sections 502(g), 515, and 4402(e) of the Employee Retirement Income Security Act of 1974, as amended and added by the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1208, 29 U.S.C.A. §§ 1132(g), 1145, and 1461(e) (West Supp. 1976-80).

29 U.S.C.A. § 1132(g) (as amended by § 306(b) of the Multiemployer Pension Plan Amendments Act of 1980):

> Attorney's fees and costs; awards in actions involving delinquent contributions
>
> (1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.
>
> (2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—
>
> (A) the unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of—
>
> (i) interest on the unpaid contributions, or
>
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

29 U.S.C.A. § 1145 (as added by § 306(a) of the Multiemployer Pension Plan Amendments Act of 1980):

Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C.A. § 1461(e) (as added by § 108(c) of the Multiemployer Pension Plan Amendments Act of 1980):

Effective date; special rules

(1) Except as provided in paragraphs (2), (3), and (4), the amendments to this Act made by the Multiemployer Pension Plan Amendments Act of 1980 shall take effect on September 26, 1980.

(2)(A) Except as provided in this paragraph, part 1 of subtitle E of this subchapter, relating to withdrawal liability takes effect on April 29, 1980.

(B) For purposes of determining withdrawal liability under part 1 of subtitle E of this subchapter, an employer who has withdrawn from a plan shall be considered to have withdrawn from a multiemployer plan if, at the time of the withdrawal, the plan was a multiemployer plan as defined in section 1301(a)(3) of this title as in effect at the time of the withdrawal.

(3) Section 1421 through 1426 of this title, relating to multiemployer plan reorganization, shall

take effect, with respect to each plan, on the first day of the first plan year beginning on or after the earlier of—

(A) the date on which the last collective bargaining agreement providing for employer contributions under the plan, which was in effect on September 26, 1980, expires, without regard to extensions agreed to on or after September 26, 1980, or

(B) 3 years after September 26, 1980.

(4) Section 1415 of this title shall take effect on April 29, 1980.

APPENDIX B

Section 302 of the Labor-Management Relations Act, as amended, 29 U.S.C. § 186 (1976 & Supp. III, 1979).

29 U.S.C. § 186:

Restrictions on financial transactions

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a

representative of employees or as such officer or employee of such labor organization.

(b) Requests, demands, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act [49 U.S.C. 301 et seq.]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in

satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in

the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by an employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such

trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.]; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

(d) Penalty for violations

Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) Jurisdiction of courts

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of title 28 (relating to notice to opposite party, to restrain violations of this section, without regard to the provisions of section 17 of title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

(f) Effective date of provisions

This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Contributions to trust funds

Compliance with the restrictions contained in subsection (c) (5) (B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

Office - Supreme Court, U.S.
FILED
SEP 30 1981
ALEXANDER L. ... CLERK

No. 80-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONER KAISER STEEL CORPORATION

ROBERT A. HAMMOND, III
A. DOUGLAS MELAMED *
LYNN BREGMAN
THOMAS W. WHITE

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Petitioner Kaiser Steel Corporation

Of Counsel:
RICHARD GARY
General Counsel
Kaiser Steel Corporation
300 Lakeside Drive
Oakland, California 94666

September 30, 1981

* *Counsel of Record*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. FEDERAL COURTS DO NOT ENFORCE ILLEGAL CONTRACT PROVISIONS	2
A. Pension Funds Are Not Exempt from the Rule That Courts Do Not Enforce Illegal Contract Clauses	2
B. *Kelly v. Kosuga* Distinguished Between Lawful and Unlawful Contract Provisions and Held That Only Lawful Provisions May Be Enforced	5
II. FEDERAL COURTS HAVE JURISDICTION TO DECIDE WHETHER CONTRACT CLAUSES THEY ARE ASKED TO ENFORCE VIOLATE SECTION 8(e)	13
III. THE AWARD OF ATTORNEYS' FEES IS NOT AUTHORIZED BY ERISA	18
IV. THE 1980 ERISA AMENDMENTS DO NOT REQUIRE ENFORCEMENT OF THE PURCHASE-OF-COAL CLAUSE	20
A. Section 306(a) Does Not Make Illegal Contract Clauses Enforceable	20
B. Section 306(a) Does Not Apply to the Conduct at Issue in This Case	25
CONCLUSION	30

TABLE OF AUTHORITIES

CASES: Page

Allied Structural Steel Corp. v. Spannaus, 438 U.S. 234 (1978) 29

Arkla Air Conditioning Co. v. Famous Supply Co., 551 F.2d 125 (6th Cir. 1977) (per curiam) 6

Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965) 12

Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962) 17

Bowles v. Willingham, 321 U.S. 503 (1944) 18

Bradley v. Richmond School Board, 416 U.S. 696 (1974) 26, 27, 29

Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947) 6

Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39 (5th Cir. 1976) 11

Central States, Southeast and Southwest Areas Pension Fund v. Alco Express Co., Civ. No. 77-70031 (E.D. Mich. Aug. 26, 1981) 28

Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945) 29

Claridge Apartments Co. v. Commissioner, 323 U.S. 141 (1944) 26

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 26

Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975) 14, 15, 16

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 9

Cort v. Ash, 422 U.S. 66 (1975) 26

Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911) 10

Eiberger v. Sony Corp., 459 F. Supp. 1276 (S.D. N.Y. 1978), *aff'd*, 622 F.2d 1068 (2d Cir. 1980) .. 10, 11

El Salto, S.A. v. PSG Co., 444 F.2d 477 (9th Cir.), *cert. denied*, 404 U.S. 940 (1971) 6

TABLE OF AUTHORITIES—Continued

	Page
Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc., 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963)	10
Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969)	10
Granddad Bread, Inc. v. *Continental Baking Co.*, 612 F.2d 1105 (9th Cir. 1979), *cert. denied*, 101 S. Ct. 854 (1981)	16
Greene v. United States, 376 U.S. 149 (1964)	29
Huge v. Long's Hauling Co., 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979)	3, 23
Hutto v. Finney, 437 U.S. 678 (1978)	27
Hyde v. United States, 225 U.S. 347 (1912)	9
International Woodworkers Local 3-10 v. NLRB, 380 F.2d 628 (D.C. Cir. 1967)	14
Kelly v. Kosuga, 358 U.S. 516 (1959)	5, 6, 7, 8, 9, 22
Kogod v. Stanley Co. of America, 186 F.2d 763 (D.C. Cir. 1950)	12
Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960)	2, 3, 4, 5, 23
Lewis v. Lowry, 295 F.2d 197 (4th Cir. 1961), *cert. denied*, 368 U.S. 977 (1962)	4
Lewis v. Mears, 297 F.2d 101 (3d Cir. 1961), *cert. denied*, 369 U.S. 873 (1962)	4
Lewis v. Mill Ridge Coals, Inc., 298 F.2d 552 (6th Cir. 1962)	23
Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962)	17
Lyons v. Westinghouse Electric Corp., 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955)	15
McMullen v. Hoffman, 174 U.S. 639 (1899)	10
Milliken v. United States, 283 U.S. 15 (1931)	29
Mullins v. Reitz Coal Co., 105 L.R.R.M. 2776 (D.D.C. 1979)	6
National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612 (1967)	10

TABLE OF AUTHORITIES—Continued

	Page
NLRB v. Amax Coal Co., 101 S. Ct. 2789 (1981)	27
NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)	26
Pennington v. UMW, 325 F.2d 804 (6th Cir. 1963), *cert. denied*, 381 U.S. 949 (1965)	6
Premier Electrical Construction Co. v. Miller-Davis Co., 291 F. Supp. 295 (N.D. Ill. 1968), *aff'd*, 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970)	10
Revlon, Inc. v. Williams International, Inc., 30 Misc. 2d 772, 214 N.Y.S.2d 456 (Sup. Ct. 1961)	11
Shwab v. Doyle, 258 U.S. 529 (1922)	28
Smith v. Evening News Association, 371 U.S. 195 (1962)	17
Sunshine Packers, Inc. v. American Can Co., 395 F.2d 86 (5th Cir. 1968)	6
Thorpe v. Housing Authority, 393 U.S. 268 (1969)	26
Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11 (1979)	14
Trust Fund v. McDowell, 103 L.R.R.M. 2219 (W.D. Wash. 1979), *appeal pending* (9th Cir. No. 80-3024)	24
Trustees, Local 387 Pension Fund v. Southern Stress Wire Corp., 509 F. Supp. 1097 (N.D. Ga. 1981)	3, 27
UAW v. NLRB, 427 F.2d 1330 (6th Cir. 1970)	14
UMW v. Pennington, 381 U.S. 657 (1965)	9
Union Pacific Railroad v. Laramie Stock Yards Co., 231 U.S. 190 (1913)	26
United States v. Bayer Co., 135 F. Supp. 65 (S.D.N.Y. 1955)	10
United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801)	26
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)	29
Vaca v. Sipes, 386 U.S. 171 (1967)	16

TABLE OF AUTHORITIES—Continued

	Page
Viacom International, Inc. v. Tandem Productions, Inc., 526 F.2d 593 (2d Cir. 1975)	6
Washington Area Carpenters' Welfare Fund v. Overhead Door Co., 488 F. Supp. 816 (D.D.C. 1980), *appeal pending* (D.C. Cir. No. 80-1501)	24
Weil v. Neary, 278 U.S. 160 (1929)	12
Welch v. Henry, 305 U.S. 134 (1938)	29
Yakus v. United States, 321 U.S. 414 (1944)	18
CONSTITUTIONAL PROVISIONS AND STATUTES:	
U.S. Const. Art. III	18
Labor-Management Relations Act:	
Section 8(e), 29 U.S.C. § 158(e) (1976)	*passim*
Section 8(f), 29 U.S.C. § 158(f) (1976)	3, 24
Section 10(c), 29 U.S.C. § 160(c) (1976)	14
Section 301, 29 U.S.C. § 185 (1976)	16
Section 301(b), 29 U.S.C. § 185(b) (1976)	4
Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980):	
Section 306(a), 29 U.S.C.A. § 1145 (West Supp. 1981)	*passim*
Section 306(b)(1), 29 U.S.C.A. § 1132(g)(2) (West Supp. 1981)	20, 28
Section 104(2), 29 U.S.C. §§ 1381-1405 (West Supp. 1981)	27
Section 108(c)(1), 29 U.S.C.A. § 1461(e)(1) (West Supp. 1981)	27
Section 108(c)(2), 29 U.S.C.A. § 1461(e)(2) (West Supp. 1981)	27
MISCELLANEOUS:	
126 Cong. Rec.:	
S10,101 (daily ed. July 29, 1980)	27
S10,102 (daily ed. July 29, 1980)	22, 23
S10,156-58 (daily ed. July 29, 1980)	27

TABLE OF AUTHORITIES—Continued

Page

S10,168 (daily ed. July 29, 1980) 23
H6,934 (daily ed. July 31, 1980) 23
S10,561 (daily ed. Aug 1, 1980) 23
S11,673 (daily ed. Aug. 26, 1980) 22, 23
H7,899 (daily ed. Aug. 26, 1980) 22, 23

Staff of the Senate Committee on Labor and Human Resources, S. 1076: The Multiemployer Pension Plan Amendments Act of 1980, 96th Cong., 2d Sess. (Comm. Print April 1980) 22, 23

1A Sutherland Statutes and Statutory Construction (C. Sands ed. 1972) 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1345

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER KAISER STEEL CORPORATION

ARGUMENT

The central question in this case is whether a federal court should lend its aid to, and require specific performance of, a contract provision that violates the federal antitrust and labor laws. In its opening brief, Kaiser Steel showed that, before this case, no court had ever enforced an illegal contract provision, and it summarized a long line of Supreme Court and lower court cases holding that illegal contract clauses may not be enforced in any way. Kaiser Steel also discussed the policy reasons behind the rule that courts do not enforce illegal contract provisions and explained why courts have refused to make exceptions to it based on the identity of the parties, allegations that the plaintiff was seeking accrued obligations or that the defendant had received the consideration owed him, or other factors.

Respondents and the *amici* that support them have ignored many of the points set forth in Kaiser Steel's opening brief. The arguments they have advanced are applicable only where a party seeks either to avoid complying

with a valid contract provision on the basis of some defense unrelated, extraneous or collateral to the lawfulness of that provision or to obtain affirmative judicial remedies for alleged violations of law. These arguments have no application to cases, like this one, in which a plaintiff is seeking judicial enforcement of a contract clause that itself violates federal law. No court has ever before enforced such a contract clause, and this Court should not do so now.

I. FEDERAL COURTS DO NOT ENFORCE ILLEGAL CONTRACT PROVISIONS.

Respondents have advanced essentially two arguments in response to Kaiser Steel's explanation of the reasons for the rule that courts do not enforce illegal contract clauses and its demonstration why enforcing the illegal purchase-of-coal clause would lead to an inequitable result in this case.[1] These arguments, however, apply only where a defendant is seeking to avoid complying with a lawful contract provision on the basis of collateral or unrelated defenses; they provide no basis for enforcing a contract provision, like the purchase-of-coal clause, that is itself illegal.

A. Pension Funds Are Not Exempt from the Rule That Courts Do Not Enforce Illegal Contract Clauses.

On the strength of *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), Respondents argue that "special considerations" exempt pension funds from the rule that courts do not enforce illegal contract clauses.[2] But *Benedict Coal* carved out no such exemption.

---

[1] *See* Brief for Petitioner ("Pet. Br.") at 11-31.

[2] Brief for Respondents ("Res. Br.") at 9-14. This is also the basic position advanced by the union and pension fund *amici* in this case. The Solicitor General evidently disagrees with this position. As he puts it, the availability of the illegality defense in contract enforcement suits by pension fund trustees has always been governed by "the same legal rules that governed the availability of the defense . . . in any type of suit . . . ." Brief for the United States as *Amicus Curiae* ("S.G. Br.") at 13.

Benedict Coal did not involve an effort to enforce an illegal contract clause.[3] There, pension fund trustees sued an employer for payments due on coal produced by that employer in accordance with the 1950 collective bargaining agreement between coal operators and the UMW. The employer did not argue that the contract provision requiring such payments was illegal or that payment would violate federal law; rather, it argued that strikes by the union violated other provisions of the collective bargaining agreement and that the damages it suffered as a result of the union's breaches should be set off against its liability to the funds under the separate, lawful royalty clause. The Court held that the employer's right to such a set off depended on whether the collective bargaining agreement could be construed as making performance by the union a condition precedent to the employer's promise to pay royalties or as making the trustees' right to payment subject to counterclaims the employer might have against the union.

In order to resolve the question of contract construction at issue there, the Court in *Benedict Coal* first analyzed the contract and found that the provision calling for contributions to the pension fund was a valid obligation that gave rise to enforceable rights irrespective of breaches

---

[3] The lower court cases upon which Respondents rely (Res. Br. at 11-13) are similarly inapposite. In *Trustees, Local 387 Pension Fund* v. *Southern Stress Wire Corp.*, 509 F. Supp. 1097 (N.D. Ga. 1981), the court held only that, under Section 8(f) of the NLRA, the absence of majority status by the union does not preclude enforcement of a lawful contract provision in a validly executed "prehire" agreement that had never been repudiated by the employer. *See* n.37, *infra*. *Huge v. Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979), and the other cases cited by Respondents involved efforts by employers to resist compliance with *lawful* contractual obligations to make pension fund contributions on account of the illegality of *other* contract provisions or union activities outside the contract. (In his concurring opinion in *Long's Hauling*, Judge Adams said that he would prefer a rule that would bar all employer defenses in contract enforcement actions brought by pension funds. No court has adopted such a rule.)

by the union of other contract provisions.[4] Then, relying in part on Section 301(b) of the Taft-Hartley Act, the Court concluded that the employer should not be permitted in effect to collect from the pension fund a money judgment owed to it by the union where there was no indication in the collective bargaining agreement that "the parties contracted to protect [the employer] by allowing the company to set off its damages [owed by the union] against its royalty obligation."[5]

Here, in contrast, the allegation is that the purchase-of-coal clause is illegal and void and creates no enforceable obligations; nothing in *Benedict Coal* says that pen-

---

[4] 361 U.S. at 465-66. The Court's analysis made clear that the pension fund would not have been entitled to recover had the contract provision it sought to enforce not created valid and binding obligations. *See Lewis v. Mears*, 297 F.2d 101, 104 (3d Cir. 1961), *cert. denied*, 369 U.S. 873 (1962) (*Benedict Coal* does not preclude employer from proving that no valid contractual obligation to pay royalties to pension fund trustees ever came into being); *Lewis v. Lowry*, 295 F.2d 197, 199 (4th Cir. 1961), *cert. denied*, 368 U.S. 977 (1962) (fact that suit was brought by pension fund trustees did not foreclose the employer's defense that no contract existed or that the agreement sued upon did not represent the real agreement between the employer and the union).

[5] 361 U.S. at 469, 470-71. The Court also noted that the payments sought by the pension fund were based upon the amount of services rendered by the union employees and could be characterized as a form of compensation to those employees. *Id.* at 469. In contrast, the payments sought by Respondents here are measured by the amount of coal purchased from non-UMW producers, not by services rendered by Kaiser Steel's employees. (*See* Pet. Br. at 6-7; *see also id.* at 4 n.4, 28-29 n.52.) Indeed, the penalty payments were not the real consideration sought by the union in insisting upon the purchase-of-coal clause in this case; instead, the union wanted Kaiser Steel to boycott non-UMW producers. (It is possible, as Respondents suggest, that if Kaiser Steel had participated in the unlawful boycott of non-UMW producers there would have been an increase in the amount of coal produced by UMW producers and a corresponding increase in the royalties payable to the funds on produced coal. But, in that event, there would have been additional UMW employees providing additional labor services, and the pension funds would have incurred additional obligations.)

sion funds are entitled to reap the benefits of illegal agreements or to obtain the aid of federal courts in enforcing void and unenforceable contract provisions. Moreover, while the Court in *Benedict Coal* sought to insulate the pension funds from the employer's wholly unrelated claim for money damages from the union, Kaiser Steel is not here trying to collect any money owed to it by the union or otherwise to raise collateral or unrelated defenses to the trustees' claim. Indeed, Respondents here concede (as they must) that Kaiser Steel's defense does directly concern their entitlement to enforce the purchase-of-coal clause, for they concede that they could not avoid being parties to any litigation brought by Kaiser Steel or any other UMW employer seeking declaratory or injunctive relief from that clause.[6] Thus, the gulf that the Court found in *Benedict Coal* between the provision the pension fund sought to enforce and the employer's defense—its damage claim against the union—does not exist in this case.

B. *Kelly v. Kosuga* Distinguished Between Lawful and Unlawful Contract Provisions and Held That Only Lawful Provisions May Be Enforced.

Unable to find a single case that has enforced an illegal contract clause, Respondents rely heavily on an expansive reading of dictum in *Kelly v. Kosuga*, 358 U.S. 516 (1959). Respondents misunderstand *Kelly* and later cases applying it.

As Kaiser Steel explained in its opening brief, *Kelly* involved two contracts, a lawful sale agreement and an

---

[6] Res. Br. at 14. It is for this reason, among others, that the argument of *amicus curiae* National Coordinating Committee for Multiemployer Plans ("NCCMP") is without merit. NCCMP argues that the illegality defense should be rejected in this case so that pension funds will not have to take sides in contract disputes between unions and employers. But because the pension funds would be proper defendants in litigation brought to challenge the purchase-of-coal clause under the legal scheme adopted by the Court of Appeals and urged by Respondents, the funds will in any event have to defend the legality of the clause in litigation.

unlawful "nondelivery" agreement. *Kelly* held that the sale agreement was enforceable but that the illegal nondelivery agreement could not be enforced.[7]

In reading *Kelly*, Respondents seize upon the Court's observation that "analysis in terms of divisibility or some other verbal formula may well be circular"[8] and try to convert it into a holding that lawful agreements

[7] *See* Pet. Br. at 12-13. In response to Kaiser Steel's statement that, until this case, no court had ever enforced an illegal contract clause, Respondents assert that "the rule of *Kelly* has been followed consistently" (Res. Br. at 18 n.17). But the "rule in *Kelly*" is that lawful contract clauses may be enforced but unlawful ones may not be. The prior cases cited by Respondents involved only the enforcement of lawful contract clauses. *See Arkla Air Conditioning Co. v. Famous Supply Co.*, 551 F.2d 125, 127 (6th Cir. 1977) (per curiam) (alleged illegality of an exclusive sales territory provision collateral to the contract sought to be enforced held no bar to enforcement of the defendant's lawful obligation to pay commissions); *El Salto, S.A. v. PSG Co.*, 444 F.2d 477, 482 (9th Cir.), *cert. denied*, 404 U.S. 940 (1971) (allegation that buyer had received unlawful commissions no defense to seller's suit for lawful purchase price where "no part of the money sought" by the seller "represented payments barred by the antitrust laws"); *Sunshine Packers, Inc. v. American Can Co.*, 395 F.2d 86, 88 (5th Cir. 1968) (fact that lender may have been barred by consent decree from making loan no defense to obligation of borrower who induced the loan to comply with lawful promise to repay); *Pennington v. UMW*, 325 F.2d 804, 806, 818 (6th Cir. 1963), *cert. denied*, 381 U.S. 949 (1965) (unlawful union security clause that could be "severed and separately condemned" no bar to enforcement of legal contract clause). *Viacom Int'l, Inc. v. Tandem Prods., Inc.*, 526 F.2d 593 (2d Cir. 1975), and *Mullins v. Reitz Coal Co.*, 105 L.R.R.M. 2776 (D.D.C. 1979), are discussed in Kaiser Steel's opening brief at 30 n.56 and 22 n.35.

Respondents also rely heavily on *Bruces's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947), but that case does not help them, either. The defendant there tried to avoid paying for goods purchased on the ground that the seller had offered larger discounts to third parties. The Court rejected the defense on the ground that the contract sued on was lawful and the violation of law, if any, was that the seller charged other purchasers a lower price.

[8] 358 U.S. at 521, *quoted in* Res. Br. at 17.

may not be separated from unlawful agreements. (Res. Br. at 17.) Closer reading of the case, however, makes clear that the Court held just the opposite.[9]

As Respondents note (Res. Br. at 16), the defendant in *Kelly* did argue that the lawful sale agreement was not separable from the illegal nondelivery agreement and, on the basis of that premise, that the plaintiff was seeking to enforce "the very agreement" that violated the antitrust laws. The Court, however, rejected that characterization of the case: Referring separately to the "nondelivery agreement" and the "sale of onions" (358 U.S. at 521), the Court said that the defendant was really arguing that he should not be required to comply with the lawful sale agreement because the illegal nondelivery agreement bore "some relation to the suit" for the purchase price (*id.* at 519). Concerned by "the breadth of [such] argument" (*id.* at 520), the Court held that the lawful sale for a fair consideration could be enforced even though it "furnished the occasion" for the illegal nondelivery agreement (*id.* at 521). The Court in *Kelly* thus rejected the argument that it could not separate the lawful agreement from the illegal agreement, distinguished the two, and held that the former was enforceable even though the latter was not.

Respondents also make much of two policy interests identified in *Kelly*—preventing people from getting "other people's property for nothing" and a reluctance to create additional antitrust remedies. (Res. Br. at 20-21). But, as explained in Kaiser Steel's opening brief, *Kelly* identified those interests only as support for its decision to enforce the *lawful* agreement there at issue, and those interests were implicated in *Kelly* in ways that have no relevance to this case.[10]

---

[9] Respondents' interpretation of the Court's discussion of the "divisibility" issue has other flaws. *See* Pet. Br. at 13 n.18; *see also id.* at 18 n.28.

[10] *See* Pet. Br. at 24 n.39 and 28-29 n.52. Respondents' effort to apply the policy interests of *Kelly* to this case suffers from other

Moreover, Respondents' policy argument proves too much, for it would mean that a court could never decline to enforce an illegal contract where other antitrust remedies were available and consideration had passed to the defendant. *Kelly* itself rejected this theory by stating unequivocally that the nondelivery agreement, if illegal, "could not be enforced." 358 U.S. at 521.

The straightforward reading of *Kelly*, then, is that lawful agreements are enforceable but illegal ones are not. Because that reading does not help Respondents, they urge a more strained interpretation of *Kelly* that focuses instead on the steps the defendant would be required to take if ordered to comply with the illegal agreement. According to Respondents, illegal contracts are enforceable except in those few cases where the remedial steps themselves would be illegal conduct. (Res. Br. at 18, 22-25.)

Respondents' reading of *Kelly* thus depends on the purported distinction between illegal conduct and conduct taken pursuant to an illegal contract provision. Indeed, it appears fair to say that Respondents' whole theory of this case turns on that distinction, for their analysis (and the Solicitor General's as well) of Section 306(a) of the 1980 ERISA Amendments also rests on it. Thus, Respondents contrast conduct taken pursuant to illegal agreements with conduct that is "itself" illegal (Res. Br. at 45), and the Solicitor General distinguishes conduct taken pursuant to illegal agreements from conduct that

---

problems as well. Enforcement of the lawful sale agreement in *Kelly* did not cause any antitrust injury; by the same token, if the defendant in *Kelly* had been permitted to use the illegality of the nondelivery agreement to avoid his obligations under the lawful sale contract, he would indeed have been able to supplement the antitrust remedies available to him for any injuries he suffered on account of the collateral illegality of the nondelivery agreement with the additional remedy of getting the onions delivered under the lawful sale agreement for nothing. In this case, in contrast, enforcement of the illegal purchase-of-coal clause would both consummate an antitrust violation and cause antitrust injury, and nonenforcement would prevent those consequences. *See id.* at 16-17.

is illegal "in and of itself" (S.G. Br. 11) or that would be illegal even if "gratuitous" (*id.* at 30).

Such a distinction has no legal significance. It fails to take account of the fact that conduct that is lawful "in and of itself" or when undertaken gratuitously becomes unlawful conduct when it is undertaken pursuant to or in furtherance of an illegal agreement.[11] *Kelly* itself made this clear. A unilateral decision by the defendant in that case not to deliver its onions to the futures market would have been entirely lawful. The antitrust laws do not prohibit such conduct "in and of itself." But that otherwise lawful activity became illegal conduct when undertaken pursuant to an illegal agreement.[12] Thus, when the Court in *Kelly* said it would not enforce the nondelivery agreement, it was saying—not that it was unwilling to order conduct that was illegal in and of itself—but rather that it would not order conduct pursuant to an illegal agreement. All such conduct is illegal conduct, and enforcing the illegal purchase-of-coal clause would thus also be enforcing illegal conduct.[13]

---

[11] *See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962) ("acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme"); *Hyde v. United States*, 225 U.S. 347, 360 (1912).

[12] As the Court noted in *UMW v. Pennington*, 381 U.S. 657, 665 & n.2 (1965), conduct that would not state any claim under the Sherman Act when taken by a union "[u]nilaterally, and without agreement with any employer group" may give rise to antitrust liability when taken pursuant to an agreement with a set of employers.

[13] Respondents may theorize that *Kelly* is different from this case on the ground that the antitrust laws were intended to prevent the boycott of futures markets at issue there, but not to prevent the payment of money pursuant to illegal hot cargo clauses. Such a theory could not be reconciled with the many cases that have refused to enforce otherwise lawful payments of money called for by illegal agreements (*see* pp. 10-12, *infra*), and it rests on an erroneous view of the antitrust and labor laws. Those laws are intended to protect employers like Kaiser Steel from being burdened by clauses like the purchase-of-coal clause. The antitrust laws are intended to protect their freedom as traders to do business with whomever

Moreover, the distinction Respondents would draw cannot be reconciled with the many cases discussed in Kaiser Steel's opening brief in which courts have refused to enforce illegal contract clauses. (Pet. Br. at 19-22, 28 n.52.) All those cases involved efforts to enforce contract provisions that required the payment of money. In each of them the plaintiff, like Respondents here, was seeking accrued obligations. In none of them would the remedy sought have required conduct that was itself illegal. Yet, in all of the cases, the courts refused to lend their aid to enforcing the illegal agreements by requiring the payment of penalties, profits, prices or damages for past conduct, or in any other way. These cases are indistinguishable from this case, and they were correctly decided.[14]

---

they wish without being penalized for doing so (*see generally Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911)); and, as this Court emphasized in *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967), the primary purpose of Section 8(e) is to protect "neutral" employers like Kaiser Steel from being harmed by the union's dispute with someone else. *See also* Pet. Br. at 14-18, 36, 38-39. Thus, it cannot be said that the antitrust and labor laws are intended only to prevent boycotts of third parties and are indifferent to the effect compliance with the purchase-of-coal clause would have on Kaiser Steel.

[14] Respondents struggle for ways to distinguish these cases (Res. Br. at 19-20 n.18), but they are unable to do so. *McMullen v. Hoffman*, 174 U.S. 639 (1899), *Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc.*, 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963), *United States v. Bayer Co.*, 135 F. Supp. 65 (S.D.N.Y. 1955), and *Premier Elec. Constr. Co. v. Miller-Davis Co.*, 291 F. Supp. 295 (N.D. Ill. 1968), *aff'd*, 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970), Respondents say, are distinguishable because the consideration running to the defendants was illegal. Respondents do not, however, explain why that should matter, and nothing in the courts' analyses suggests that the cases turned on that fact.

Respondents argue that the court in *Eiberger v. Sony Corp.*, 459 F. Supp. 1276 (S.D.N.Y. 1978), *aff'd*, 622 F.2d 1068 (2d Cir. 1980), refused to enforce the contract provision at issue there on the ground that the claimant was not entitled to the fees it sought because they were "unearned." But that is not what the court held.

These cases reflect the heretofore uniform rule that courts will not give their imprimatur to violations of fed-

---

The contract at issue in *Eiberger* imposed on Eiberger, in consideration for his obtaining a Sony distributorship and Sony's obligations in connection therewith, various duties including an obligation to pay so-called "warranty fees" to Sony for any sales made by Eiberger outside his assigned territory. Sony argued that the payments were necessary to pay for warranty work done on merchandise sold by Eiberger in other distributors' territories. The court found, however, that the fees were "unearned," and thus illegal, because they were not payments for warranty work but rather constituted an unlawful inducement to Eiberger not to make extraterritorial sales. The court held that, because the warranty fee provision was illegal, Sony could not collect even accrued payments thereunder. *Eiberger* is indistinguishable from this case: Here, too, the payments are "unearned" in the sense that they are not compensation for particular services but rather are measured by and intended to deter Kaiser Steel's dealings with third parties. Here, too, the contract provision calling for the payments is illegal and thus may not be enforced, even for accrued payment obligations.

Respondents misunderstand *Revlon, Inc. v. Williams Int'l, Inc.*, 30 Misc. 2d 772, 214 N.Y.S.2d 456 (Sup. Ct. 1961), and *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976). They argue that those cases "distinguished between enforcement of an illegal contract requiring future conduct and one for goods or services already delivered" (Res. Br. at 19 n.18). But, like *Eiberger*, *Revlon* was a suit for penalty payments for extraterritorial dealing by a distributor. Contrary to Respondents' reading, the case did not involve "enforcement of an illegal contract requiring future conduct" but, like this case and *Eiberger*, the imposition of penalties for "buying outside" in the past. *See* 214 N.Y.S.2d at 460. In *Carpa*, the court said that it would enforce a lawful obligation to make certain lease payments on the ground that the obligation was "collateral" to an allegedly illegal tying arrangement implemented by a penalty provision in the contract. 536 F.2d at 54-55. But the court made clear that it "would be confronted with an entirely different situation if [the franchisor] was before us seeking to enforce the 20% penalty provision for buying outside." *Id.* at 55 n.6. Such penalty payments—like the penalty payments sought here—would not be for additional goods bought or services rendered, and "the franchisor would be enlisting the Court's aid in directly breaching the antitrust laws." *Id.*

[Footnote continued on page 12]

eral law by enforcing illegal contracts in any way. This principle both defines the role of federal courts and safeguards the policies sought to be served by the laws that make certain kinds of contract provisions illegal. Affirming the Court of Appeals' decision in this case would depart from this principle and undermine those policies: It would cause an injury those laws are intended to prevent; it would, by holding out the prospect of enforcement of illegal contract provisions in the future, create incentives for others to include illegal provisions in their agreements and to comply with them; and it would encourage parties who, like Kaiser Steel, are unwilling to participate in illegal conspiracies to bring unnecessary litigation challenging the lawfulness of contract clauses that might otherwise be ignored and remain unenforced.[15]

---

[14] [Continued]

Respondents make no effort to distinguish *Weil v. Neary*, 278 U.S. 160 (1929), or *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965). And they would distinguish *Kogod v. Stanley Co. of America*, 186 F.2d 763 (D.C. Cir. 1950), on the ground that the plaintiff there was a third party beneficiary that had not provided any goods or services. That, of course, could be said about Respondents in this case as well.

[15] Affirming the Court of Appeals' decision in this case would also be inequitable. If Respondents had brought suit to enforce the purchase-of-coal clause at the outset of the 1974 agreement, their ability to enforce that clause and to collect the payments called for by it would have depended upon the lawfulness of the clause: If the clause were lawful, they could have enforced it; if it were illegal, they could not have reaped its benefits. Respondents wish now to be better off than they would have been had they initiated such litigation. There is no reason why Respondents should get such a benefit from delay in litigation. As we explained in our opening brief, only Respondents knew whether they intended to abandon their longstanding policy of not enforcing the purchase-of-coal clause, so only they knew whether litigation regarding the clause was necessary. (Pet. Br. at 7 & n.12, 26-27.) It is thus Respondents, if anyone, who should bear the burden of any delay in resolving the legality of the purchase-of-coal clause; they should not be permitted to turn that delay into an excuse for undeserved windfall gains.

II. FEDERAL COURTS HAVE JURISDICTION TO DECIDE WHETHER CONTRACT CLAUSES THEY ARE ASKED TO ENFORCE VIOLATE SECTION 8(e).

In our opening brief, we explained that, whatever may be the jurisdiction of federal courts to provide affirmative remedies for violations of certain laws, those courts have jurisdiction to determine whether a contract clause violates federal law before using their equitable powers to enforce it; and we explained that Congress intended no exception to this rule in enacting Section 8(e) of the LMRA. (Pet. Br. at 32-47.) In response, Respondents have made, in essence, three arguments. These arguments, however, apply only where a party seeks a federal court remedy to redress labor law violations; they do not support the proposition that federal courts are without jurisdiction to decide whether contract clauses they are asked to enforce are illegal.

First, in contrast to their expansive reading of judicial dicta, Respondents are remarkably stingy in construing statutory language. According to Respondents, Section 8(e) does not mean what it says in providing that "any contract or agreement" containing an illegal hot cargo clause "shall be to such extent unenforcible and void." 29 U.S.C. § 158(e) (1976). Instead, Respondents argue, "that language was used to make enforcement of hot cargo agreements . . . an unfair labor practice subject to the exclusive jurisdiction of the Board and to describe the status of agreements after the NLRB" has found them to be unlawful.[16]

---

[16] Res. Br. at 29. Respondents made this same argument below, but it was rejected by the Court of Appeals. The Court of Appeals held, instead, that Section 8(e) rendered hot cargo clauses void, regardless whether the NLRB had found them to be illegal, but that whether federal courts could entertain the illegality defense depended on whether the remedy sought by the plaintiff was a boycott of non-union suppliers or some other form of enforcement of the contract. (*See* 642 F.2d at 1314-15; Pet. App. 22a-23a. *See also* Pet. Br. at 36 & n.66.)

The basic problem with Respondents' restrictive reading of the statutory language is that nothing supports it.[17] Their argument is little more than *ipse dixit.*

Respondents argue that the legislative history shows that Congress wanted to ensure that all hot cargo clauses "whenever executed"—not just hot cargo clauses entered into after the enactment of Section 8(e)—would be subject to the NLRB's unfair labor practice jurisdiction. (Res. Br. at 31.) The excerpts from the legislative history on which Respondents rely do appear to explain why Congress included language in Section 8(e) making its prohibitions applicable to hot cargo clauses "entered into *heretofore or hereafter*" (emphasis added). But they do not explain why Congress provided in Section 8(e), not just that all such hot cargo clauses are unfair labor practices, but also that they are "unenforcible and void." [18] That clear statutory command cannot be explained away by focusing on other statutory language.[19]

---

[17] In *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 634 (1975), this Court noted that there is "no legislative history . . . suggesting that labor-law remedies for § 8(e) violations were intended to be exclusive."

[18] *See* Pet. Br. at 35-41. Respondents' reading of Section 8(e) not only ignores the "unenforcible and void" language, but also would render that language meaningless. According to Respondents, that language is intended to describe the status of hot cargo clauses *after* the NLRB has found them to be unlawful. Res. Br. at 29. As with all unfair labor practices, however, once the NLRB has found a contract clause to be illegal, it is required by Section 10(c) of the LMRA, 29 U.S.C. § 160(c) (1976), to issue a cease and desist order preventing enforcement of the illegal clause. *International Woodworkers Local 3-10 v. NLRB*, 380 F.2d 628, 630-31 (D.C. Cir. 1967); *UAW v. NLRB*, 427 F.2d 1330, 1331-32 (6th Cir. 1970). The "unenforcible and void" language in Section 8(e) is thus not needed to prevent enforcement of hot cargo clauses that have already been found illegal by the NLRB; yet, according to Respondents, that is its only purpose.

[19] As this Court has recognized, where a statute provides that certain contracts are "void," "[a]t the very least," the statute "could be raised defensively in private litigation to preclude the enforcement of [the] contract." *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 18 (1979).

Second, Respondents seek to extract from this Court's decisions the principle that under no circumstances may federal courts decide unfair labor practice-type issues. They argue that "this Court has never wavered from the principle" that federal courts must "abstain from independently resolving [any] dispute" that is identical to one that "could have been, but was not" presented to the NLRB. (Res. Br. at 27; *see also id.* at 33-35.) Even if that were true, it would not resolve the issue in this case, for none of the cases cited by Respondents involved the issue whether a federal court may decide whether a contract clause it is asked to enforce violates federal law.[20]

Moreover, Respondents' reading of the cases is incorrect. In *Connell*, for example, the issue whether the contract provision in question comported with Section 8(e) "could have been, but was not" presented to the NLRB by the employer who was challenging the clause. Nevertheless, this Court resolved the issue and decided that the

---

[20] In summarily dismissing as "untenable" the distinction between remedies and defenses, Respondents fail to recognize that a court must resolve the illegality defense in order to determine whether the contract clause the plaintiff seeks to enforce has any legal effect in the first place and, thus, whether the plaintiff is entitled to the remedy it seeks. Respondents also fail to distinguish the many cases allowing a party to raise as a defense matters that it may not assert as an affirmative claim for relief. (*See* Pet. Br. at 32 & n.61.) In all those cases, the same sort of "doctrinal foundations" as those that underlie the NLRB's exclusive jurisdiction over labor law remedies (Res. Br. at 26) were thought to preclude the court from deciding the issue when it arose in an affirmative claim for relief. But in none of the cases were those doctrinal foundations held to supersede the court's need to be able fully to resolve the case before it by deciding the issue when it was raised as a defense. As Judge Hand explained, for example, in *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 189-90 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955), federal courts have exclusive jurisdiction over actions brought under the federal antitrust laws to ensure that those laws are "uniformly administered," but it is not "inconsistent" to allow "violations of the Acts to be raised as valid defences to actions brought in state courts."

provision violated Section 8(e).[21] Similarly, in *Vaca*, this Court held that the exclusive jurisdiction doctrine has no application to suits, like this one, brought under Section 301 of the LMRA and that "the jurisdiction of the courts" is not "destroyed by the fact that the employee [plaintiff] . . . finds it necessary to prove an unfair labor practice . . . ."[22] And in other cases, too, this Court has

---

[21] *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 626, 634 (1975). As noted in Kaiser Steel's opening brief, under *Connell* the court would have had to resolve the issue whether the purchase-of-coal clause comports with Section 8(e) if Kaiser Steel had sought a declaratory judgment that the clause violates the Sherman Act (*see, e.g., Granddad Bread, Inc.* v. *Continental Baking Co.*, 612 F.2d 1105, 1109-11 (9th Cir. 1979), *cert. denied*, 101 S. Ct. 854 (1981)), and the court in this case will also have to do so if Kaiser Steel is permitted to raise its antitrust defense. (*See* Pet. Br. at 41-42 n.78.)

In an effort to explain away Justice Stewart's statement in *Connell* that a party may "simply . . . ignore" a contract provision that violates Section 8(e) and that any effort to enforce such a provision "would obviously be unavailing" (421 U.S. at 649-50 n.9 (dissenting opinion), *quoted in* Pet. Br. at 39), Respondents assert that the statement "certainly" means that Kaiser Steel cannot raise the 8(e) defense in this case but instead had to seek relief from the NLRB when this suit was filed. (Res. Br. at 35 n.31.) There is no basis for Respondents' reading of Justice Stewart's statement.

[22] *Vaca v. Sipes*, 386 U.S. 171, 184, 186, 187 (1967). The Court held that a federal court may decide whether a union had breached its duty of fair representation, even though such a breach would have been an unfair labor practice and even though the employee challenging the union had not sought relief from the NLRB. Respondents assert, without explanation, that the considerations on which the Court relied in *Vaca* are "inapposite here." (Res. Br. at 35 n.32.) But the factors to which the Court pointed in explaining why its decision would not disserve the objectives of the exclusive jurisdiction doctrine were not intended to be exhaustive (*see* 386 U.S. at 179). More important, those considerations—the extent to which the labor law issue before the court has been "judicially developed" and the comparative expertise of the NLRB and the courts regarding the particular issue (*id.* at 181)—are equally applicable here. (*See* Pet. Br. at 44.)

decided issues identical to those that could have been presented to the NLRB.[23]

In short, it has not been the law that only the NLRB can resolve legal disputes that could have been presented to it. To the contrary, while only the NLRB may provide affirmative labor law remedies for unfair labor practices, the federal courts may resolve labor law issues that arise in cases, like this one, otherwise properly before them, regardless whether those issues could have been presented to the NLRB.

Third, Respondents dispute our suggestion that the Court of Appeals' construction of the LMRA renders it unconstitutional.[24] Respondents argue that only the NLRB can provide remedies for unfair labor practices, that Congress decided not to create a private right of action for unfair labor practices, and that the constitutionality of that decision has been upheld. (Res. Br. at 36-37.)

---

[23] *E.g.*, *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 245 n.5 (1962); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 101 n.9 (1962); *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). Respondents would distinguish these cases on the ground that they hold only that federal courts are not precluded from deciding contract actions simply because the breach is also an unfair labor practice. (Res. Br. at 35.) This purported distinction ignores the language of those cases, which, far from being so limited, states without qualification that the exclusive jurisdiction doctrine has "no application" to suits brought under Section 301. (*See* Pet. Br. at 42.)

[24] Respondents reiterate the argument they pressed in opposition to our Petition for Certiorari that Kaiser Steel has improperly raised this constitutional issue for the first time in this Court (Res. Br. at 36). That is not the case. From its inception, this case has concerned the proper construction of the LMRA. It is the Court of Appeals' construction, which as noted is different from the construction urged by Respondents (*see* n.16, *supra*), that gives rise to the constitutional problem, and we have pointed out that problem in support of our contention that the Court of Appeals' construction of the statute is incorrect. The issue arose for the first time after the Court of Appeals' decision, and it is properly before this Court.

Respondents' argument misses the point. This case does not call into question the constitutionality of Congress' decision to make the NLRB the exclusive forum for obtaining remedies for unfair labor practices. Rather, this case concerns the defenses that Kaiser Steel may raise when the power of a federal court is invoked to enforce an illegal contract clause. Article III of the Constitution both prohibits legislation that withdraws controlling questions of law from federal enforcement courts and ensures that courts remain free fully to decide cases over which Congress gave them jurisdiction. The Court of Appeals' decision that the LMRA requires a federal court to enforce an illegal hot cargo clause, even though neither it nor any other court has ever been able to pass on the lawfulness of the clause, runs afoul of these principles and renders the statute unconstitutional.[25]

III. THE AWARD OF ATTORNEYS' FEES IS NOT AUTHORIZED BY ERISA.

Respondents make three arguments in support of the award of attorneys' fees. None is correct.

First, Respondents argue that this suit was brought to enforce the UMW's health and retirement plans. To the contrary, the complaint alleges that Kaiser Steel violated the collective bargaining agreement, not that it violated any pension plan. Respondents never put any plan in the record or otherwise brought the provisions of any such plan to the attention of the district court.[26] More-

---

[25] *See* Pet. Br. at 44-47. Neither *Yakus v. United States*, 321 U.S. 414, 428 (1944), nor *Bowles v. Willingham*, 321 U.S. 503, 520-21 (1944), the two cases cited by Respondents, is to the contrary. In both cases, the statutes in question assured aggrieved persons of an opportunity for judicial review of their legal contentions by an Article III court; thus, neither case presented the question at issue here—whether Congress can withdraw from an enforcement court a controlling question of law that no court has been able to decide.

[26] Respondents seek to excuse this failure by arguing that Kaiser Steel did not oppose their request for fees in the district court. (Res. Br. at 49 n.43) In fact, however, Kaiser Steel repeatedly contested Respondents' entitlement to attorneys' fees in the district

over, this suit could not have been brought to enforce any such plan because none of the plans imposes any obligations on Kaiser Steel. As Judge Wilkey concluded in his dissent in the Court of Appeals, the plans—even as characterized by Respondents—include only "a description of the source of funding and impose[] no independent obligation on Kaiser." [27] Because the plans impose no obligations on Kaiser Steel, Kaiser Steel could not have violated or breached the plans, and Respondents could not have brought this action to enforce the plans.

Second, Respondents argue that this suit was brought to enforce ERISA. They reason that ERISA imposed fiduciary obligations on them and that they would have risked violating ERISA if they had not brought this suit. (Res. Br. at 49-50.) But even if ERISA did require Respondents to sue, this action would not be one brought to enforce ERISA. As Judge Wilkey noted, Respondents' argument "confuse[s] an effort to *comply* with ERISA

---

court. *See* Memorandum in Opposition to Motion of Plaintiffs for Summary Judgment (Oct. 17, 1978) at 35 n.44 (C.A.J.A. 325); Memorandum in Support of Motion To Transfer (June 2, 1978) at 4 n.* (C.A.J.A. 84); *see also* Reply in Support of Motion To Transfer (July 5, 1978) at 7-8 n.8 (C.A.J.A. 134-35); Answer of Defendant Kaiser Steel Corporation (June 2, 1978) at 1 ¶ 1 (C.A.J.A. 71). In any event, it was Respondents' burden to prove their entitlement to attorneys' fees and to place in the record the alleged basis for that claim. As it was, the district court awarded attorneys' fees "without explanation, and without the benefit of briefing or oral argument." 642 F.2d at 1334; Pet. App. 65a (Wilkey, J., dissenting).

[27] 624 F.2d at 1334-35; Pet. App. 66a-67a (Wilkey, J., dissenting). In their Statement of Facts, Respondents state that the funding of the trusts is governed solely by the collective bargaining agreement and make no mention of the plans. (Res. Br. at 3.) With respect to the plans themselves, Respondents say only that they "make[] clear that employers were to fund" the trusts in accordance with the terms of the collective bargaining agreement and that two of the plans "expressly state" that contributions to the trusts are to be made in accordance with that agreement. (*Id.* at 49 & n.43.)

with an action to *enforce* it." [28] Because Respondents do not allege that Kaiser Steel has violated any provision of ERISA, this action could not have been brought to enjoin or redress a violation of that statute.

Finally, Respondents argue that the attorneys' fee award is authorized by Section 306(b) of the 1980 ERISA amendments. As we pointed out in our opening brief, however, that section authorizes a fee award only in actions brought under Section 306(a) of the 1980 ERISA amendments. (Pet. Br. at 49.) This is not such an action. Section 306(a) was enacted and became effective after the Court of Appeals' decision in this case. As will be seen below, it does not apply to the 1974 collective bargaining agreement at issue here.

IV. THE 1980 ERISA AMENDMENTS DO NOT REQUIRE ENFORCEMENT OF THE PURCHASE-OF-COAL CLAUSE.

Respondents and the Solicitor General argue that Section 306(a) of the 1980 ERISA Amendments,[29] which was enacted and took effect after the Court of Appeals' decision in this case (and years after expiration of the 1974 collective bargaining agreement here at issue), requires enforcement of the purchase-of-coal clause. Their analysis of Section 306(a) and its applicability to this case is seriously flawed.

A. Section 306(a) Does Not Make Illegal Contract Clauses Enforceable.

Congress enacted Section 306(a) of the 1980 ERISA Amendments, as Respondents put it, to "creat[e] . . . a direct . . . ERISA cause of action for the collection of delinquent contributions by trustees of multiemployer plans." (Res. Br. at 38.) The section serves this pur-

[28] 642 F.2d at 1335; Pet. App. 67a (Wilkey, J., dissenting) (emphasis in original).

[29] Section 306(a) of the Multiemployer Pension Plan Amendments Act of 1980 (the "1980 ERISA Amendments"), Pub. L. No. 96-364, 94 Stat. 1208 (1980), added Section 515 to ERISA, 29 U.S.C.A. § 1145 (West Supp. 1981).

pose by providing that every employer who is obligated by a plan or collective bargaining agreement to make pension fund contributions "shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." 29 U.S.C.A. § 1145 (West Supp. 1981).

Far from abolishing the illegality defense, Section 306(a) explicitly requires employers to contribute to pension funds only where doing so would not be "inconsistent with law," and the phrase "inconsistent with law" is in no way qualified or restricted. By its terms, the statute thus suggests reaffirmation of the longstanding principle that illegal contract clauses will not be enforced. Where making contributions would be "inconsistent with law"—where, for example, making the payments would be an act in furtherance of an illegal agreement or where the law provides that the employer may defend an action seeking contributions to a pension fund on the ground that the contract clause calling for such contributions violates federal law—then the employer is not required to make the contributions.

As with their construction of Section 8(e), however, Respondents, and in this case the Solicitor General, reject this straightforward construction of the statutory language. They construe it to mean instead that, where a contract provision calls for employer contributions to pension funds, employers must make those contributions, even if the provision calling for them is illegal, so long as the mere payment of money would not be illegal "in and of itself" or if made "gratuitous[ly]."[30] In other

[30] S.G. Br. at 11, 30; *see* Res. Br. at 45. This construction is certainly not the one most readily suggested by the statutory language. Indeed, Respondents themselves quoted Section 306(a) in its entirety in the text of their Opposition to Kaiser Steel's Petition for Certiorari, but they did not even suggest that the section might have the effect of restricting illegality defenses of the sort at issue here. *See* Brief for Respondents in Opposition at 25.

Respondents now argue that Section 306(a) was intended to preclude defenses "not grounded in the terms of the agreement." Res. Br. at 38, 39. So characterized, Section 306(a) would not

words, their construction of Section 306(a), like Respondents' reading of *Kelly v. Kosuga*, turns entirely on the purported distinction between illegal conduct and conduct taken pursuant to illegal agreements. As discussed above, however, that distinction is conceptually flawed and has no support in the law.[31]

Respondents and the Solicitor General base their narrow construction of the statutory language on statements by two Congressmen in the legislative history of the amendments.[32] Those statements are too thin a reed on which to rest a construction of the statute that is contradicted by its plain language and would overrule basic legal principles concerning the enforceability of illegal contracts that have been embodied in judicial decisions for decades.[33]

---

preclude Kaiser Steel's defense in this case, for nothing could be more "grounded in the terms" of the purchase-of-coal clause than the defense that that very clause is illegal and void and creates no enforceable rights.

[31] *See* pp. 8-12, *supra*.

[32] *See* 126 Cong. Rec. S10,102 (daily ed. July 29, 1980) (remarks of Sen. Williams in colloquy with Sen. Matsunaga); *id.* at S11,673 (daily ed. Aug. 26, 1980) (remarks of Sen. Williams); *id.* at H7,899 (daily ed. Aug. 26, 1980) (remarks of Rep. Thompson). A similar statement previously appeared in a committee print of the proposed bill. *See* Staff of the Senate Comm. on Labor and Human Resources, S. 1076: The Multiemployer Pension Plan Amendments Act of 1980, 96th Cong., 2d Sess. 44 (Comm. Print April 1980) ("Comm. Print"). That document, of course, was only a committee staff document prepared for the use of the Committee and is not an expression of the views of the Committee itself.

[33] Section 306(a) was included in the 1980 ERISA Amendments under circumstances that make it all but impossible to believe that Congress was aware of—much less understood and adopted—fleeting remarks in the debates that were not expressly included in the statutory language. As Senator Armstrong observed, the bill containing Section 306 was "amended, altered, changed, and otherwise fiddled with no less than 335 times" in the 30 days since it had been reported out of the Labor Committee, and the process by which the bill was hurried through Congress was "silly" and

Moreover, even if Section 306(a) were construed as if Congress had adopted the views expressed by those Congressmen, it would still not require enforcement of illegal contract clauses calling for pension fund contributions. In the first place, the two Congressmen were concerned about the ability of pension fund trustees to enforce lawful obligations of employers to make contributions to pension funds. They did not say that employers should be precluded from raising *any* defenses in actions brought to recover such contributions.[34] To the contrary, they expressed concern only about employers seeking to avoid their obligations under lawful contract clauses on the basis of allegations of the unrelated or collateral illegality of other contract provisions or events outside the contract. Every time the Congressmen decried defenses raised in collection actions, they spoke of "unrelated" [35] or "extraneous" defenses,[36] and the cases they mentioned similarly involved only extraneous or collateral defenses.[37]

"sloppy": "No bill for markup. No committee report. No 3-day rule for Senators to consider [the] legislation." 126 Cong. Rec. S10,168 (daily ed. July 29, 1980). *See also* 126 Cong. Rec. H6,934 (daily ed. July 31, 1980) (remarks of Rep. Frenzel); 126 Cong. Rec. S10,561 (daily ed. Aug. 1, 1980) (remarks of Sen. Jepsen).

[34] Indeed, Congress rejected a proposal made by Theodore Grooms on behalf of the Western Conference of Teamsters Pension Fund (*quoted in* S.G. Br. at 19) that would have abolished all defenses in actions to enforce certain types of provisions in collective bargaining agreements calling for payments to pension funds.

[35] 126 Cong. Rec. at S11,673 (daily ed. Aug. 26, 1980) (remarks of Sen. Williams); *id.* at H7,899 (daily ed. Aug. 26, 1980) (remarks of Rep. Thompson); *see also id.* at S10,102 (daily ed. July 29, 1980) (query by Sen. Matsunaga); Comm. Print, *supra*, at 44.

[36] 126 Cong. Rec. at S11,673 (daily ed. Aug. 26, 1980) (remarks of Sen. Williams).

[37] The Congressmen mentioned five cases; but, as the Solicitor General recognizes, "none of those cases involved the enforcement of a contribution clause that itself was alleged to violate the law." S.G. Br. at 28. The Congressmen applauded *Lewis v. Benedict Coal Corp.* and *Huge v. Long's Hauling Co.*, both of which involved lawful contract clauses requiring pension fund contributions (*see* pp. 2-5 & n.3, *supra*), and *Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d

Respondents' and the Solicitor General's interpretation of the remarks upon which their argument is based is unsound for another reason as well. Had the two Congressmen meant to abolish all defenses other than those based on the legality of the act of making the contributions "in and of itself," as Respondents and the Solicitor General believe, they presumably would have condemned all defenses "unrelated" or "extraneous" *to the making of payments.* Instead, they criticized only defenses "unrelated" or "extraneous" to "the employer's *promise and the plan's entitlement* to the contributions." [38] Thus, these Congressmen seem clearly to have contemplated that courts could continue to entertain the defense that the contractual *promise* sued on—like the purchase-of-coal clause here—is illegal and that the funds are therefore not entitled to the payments they seek.[39]

---

552 (6th Cir. 1962), which barred an employer from raising, as a defense to a suit to enforce a lawful contract clause requiring pension fund contributions, an allegation that the fund had not been properly administered by the trustees. The Congressmen criticized *Washington Area Carpenters' Welfare Fund v. Overhead Door Co.*, 488 F. Supp. 816 (D.D.C. 1980), *appeal pending* (D.C. Cir. No. 80-1501), and *Trust Fund v. McDowell*, 103 L.R.R.M. 2219 (W.D. Wash. 1979), *appeal pending* (9th Cir. No. 80-3024), both of which held that even lawful contract provisions in "pre-hire" agreements entered into pursuant to Section 8(f) of the NLRA do not create enforceable rights until after union certification. But even if these latter two cases had been decided to the contrary, as the two Congressmen evidently wished, they would have meant only that lawful provisions in "pre-hire" agreements are enforceable prior to the time the agreements are repudiated by the employer. Such a holding would not make enforceable illegal contract clauses calling for pension fund contributions.

[38] *See* nn.35, 36, *supra* (emphasis added).

[39] There is another reason why Section 306(a) should not be construed to abolish the illegality defense in ERISA actions. If that section were construed to mean that a federal court must enforce a contract clause even though neither it nor any other court has had an opportunity to decide whether the clause violates Section 8(e), it would raise the same constitutional problem as that posed by the Court of Appeals' construction of the LMRA. *See* Pet. Br. at 44-47. (Congress could, to be sure, amend Section 8(e)

In sum, Section 306(a) of the 1980 ERISA Amendments does not abolish the illegality defense in contract actions brought by pension fund trustees. It was intended to achieve the very different purpose of providing a new cause of action and new remedies for wrongful breaches of collective bargaining agreements. It expressly limited the new duty it was imposing upon employers to a requirement to make payments where "not inconsistent with law." While two Congressmen expressed concern about extraneous defenses raised by employers in collection actions, they limited their concerns to defenses that are "unrelated to the employer's promise to pay and the plan's entitlement to the contributions." Neither their remarks nor the language of the statute can plausibly be read to abolish the heretofore unbroken rule that courts do not enforce illegal contract provisions.

B. Section 306(a) Does Not Apply to the Conduct at Issue in This Case.

Even if Section 306(a) of the 1980 ERISA Amendments were intended to bar employers from raising the kinds of illegality defenses that are at issue here, it would not apply retroactively to create liability for the conduct involved in this case—Kaiser Steel's failure to make contributions under an agreement that took effect in 1974 and terminated in 1977. To apply Section 306(a) to conduct that occurred nearly three years before its effective date would conflict with the intention of Congress and violate essential notions of fairness.

---

of the LMRA to make collective bargaining provisions like the purchase-of-coal clause lawful in these circumstances. But it did not do that in Section 306(a). *See* 1A Sutherland Statutes and Statutory Construction 139-40 (C. Sands ed. 1972) ("Amendments by implication . . . are not favored" and Congress will not be held to have amended a prior statute "unless the terms of the subsequent act are so inconsistent with the provisions of the prior law that they cannot stand together"). Congress should no more be presumed improperly to have sought to require federal courts to enforce illegal contracts without judicial review by juxtaposing the ERISA Amendments and the LMRA than by the LMRA alone.)

The structure of the statute and its legislative history show that Congress intended Section 306(a) to operate only prospectively and not to apply to conduct that terminated prior to the effective date of the statute.[40] Section

[40] The issue here is not, as Respondents and the Solicitor General evidently believe, whether Congress intended Section 306(a) to apply in pending cases (*see* Res. Br. at 46; S.G. Br. at 31-32). Rather, the question is whether Congress intended the new substantive duty established by Section 306(a) to apply to conduct that occurred years before its effective date. This Court has long recognized that "legislation must be considered as addressed to the future, not to the past," *Union Pac. R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913), and that "[r]etroactivity, even where permissible, is not favored, except upon the clearest mandate." *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944).

Respondents and the Solicitor General rely exclusively on the principle of *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974), that an appellate court should presumptively "apply the law in effect at the time it renders its decision." *Bradley*, however, was not addressed to the question whether new statutory duties are to be applied retroactively to completed conduct. Indeed, in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), decided earlier in the same term as *Bradley*, the Court declined to apply new statutory and regulatory provisions to past conduct. Although the new provisions were "in effect" at the time of the Court's decision and would have applied had the conduct occurred after they became effective, the Court noted simply that "the statutory amendments and the administrative regulations are, of course, inapplicable to the cases now before us." *Id.* at 639 n.8.

In none of this Court's cases applying the *Bradley* principle was an intervening change in law applied to alter the substantive principles applicable to past conduct. Those cases involved changes that affected future conduct (*see United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (treaty provided for restoration of property not definitely condemned prior to its ratification); *Thorpe v. Housing Auth.*, 393 U.S. 268, 281-83 (1969) (change in applicable housing regulations applied to evictions sought after change took effect); *Cort v. Ash*, 422 U.S. 66, 76-77 (1975) (statute creating Federal Election Commission as exclusive forum for adjudicating campaign finance violations applied where plaintiff sought only injunctive relief against future violations); *cf. NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 164-65 (1975) (amendment to the Freedom of Information Act changing the standards for the "in-

306(a) creates a new statutory duty to make pension fund contributions called for by collective bargaining agreements. Congress provided that that section "shall take effect" on the date of enactment, September 26, 1980.[41] Nothing in the Amendments suggests that the new duty created by Section 306(a) is to apply retroactively. The logical construction of a statute that creates a new duty and establishes an effective date for it is that the duty applies only to conduct occurring after the effective date.

Indeed, Congress carefully considered whether and when to give retroactive application to the new substantive provisions of the 1980 ERISA Amendments, and it explicitly provided for retroactive application of other provisions of those Amendments that it wanted to apply retroactively.[42] Congress made no such provision for retroactive application of Section 306(a). In light of its explicit choice to do so in other areas, it cannot be said to have intended that section to apply retroactively.[43]

---

vestigative records" exception applied prospectively to documents not yet disclosed)) or that merely provided new remedies, specifically the award of attorneys' fees, for the violation of pre-existing substantive duties (*see Bradley v. Richmond School Board*, 416 U.S. 696, 721 (1974); *Hutto v. Finney*, 437 U.S. 678, 694-95 n.23 (1978)).

[41] 29 U.S.C.A. § 1461(e)(1) (West Supp. 1981).

[42] The extensive provisions establishing liability for employers who withdraw from multiemployer pension plans (29 U.S.C.A. §§ 1381-1405 (West Supp. 1981)) were generally made effective on April 29, 1980, almost five months before the enactment of the statute. 29 U.S.C.A. § 1461(e)(2) (West Supp. 1981). The floor debates show that Congress considered the possible unfairness of applying the new statutory requirements to conduct occurring before the statute was enacted and carefully selected the effective date to reconcile its concerns about fairness with the special need for retroactive application of the withdrawal provisions. *See* 126 Cong. Rec. S10,101 (daily ed. July 29, 1980) (remarks of Sen. Javits); *id.* at S10,156-58 (colloquy between Sens. Pressler and Matsunaga).

[43] Respondents cite *NLRB v. Amax Coal Co.*, 101 S. Ct. 2789, 2799 n.22 (1981), and *Trustees, Local 387 Pension Fund v. Southern Stress Wire Corp.*, 509 F. Supp. 1097, 1104-05 (N.D. Ga. 1981) (Res. Br. at 48 n.42), but neither applied the 1980 ERISA Amend-

To apply Section 306(a) retroactively to Kaiser Steel's terminated conduct would, moreover, be fundamentally unfair. If Respondents' and the Solicitor General's construction of Section 306(a) were correct, that section would impose a new substantive duty on employers by requiring them to make contributions called for by contract provisions that violate the antitrust and labor laws. In addition, Section 306(b) provides new and unforeseen remedies for violations of this new duty, including the mandatory award of attorneys' fees and the award of interest at twice the prevailing rate.[44]

Had Kaiser Steel been subject to such a duty during the contract term, its conduct would have been materially different from what it was. Kaiser Steel decided not to comply with the purchase-of-coal clause because it believed, on the basis of the law in effect during the term of the 1974 agreement, that that clause was illegal and unenforceable and that, if Respondents reversed their longstanding policy of nonenforcement of the clause, it would be able to raise the illegality defense. To deny

---

ments to alter retroactively the standards applicable to conduct that occurred prior to the effective date of the Act. *Amax* referred to the 1980 ERISA Amendments only in passing; those Amendments had no direct bearing on the questions presented; and the Court's decision rested entirely on prior law. *Southern Stress Wire* referred to the 1980 ERISA Amendments only in connection with its interpretation of the prior law.

[44] *See* 29 U.S.C.A. § 1132(g)(2) (West Supp. 1981). It is questionable whether the provision for double interest, which allows a monetary award that is grossly excessive in relation to any actual damages suffered by the funds and is thus penal in nature, may be applied retroactively to Kaiser Steel in any event. *See Shwab v. Doyle*, 258 U.S. 529, 534 (1922). One district court has applied the provision retroactively where the pension plans themselves provided for interest and attorneys' fees. The court noted that retroactive application of the interest provision in that case would not impose any unanticipated obligation on the employer, but its analysis appears in some respects to have been erroneous. *Central States, Southeast and Southwest Areas Pension Fund v. Alco Express Co.*, Civ. No. 77-70031 (E.D. Mich. Aug. 26, 1981). The question of retroactive application of the double interest provision is, however, not before the Court in this case.

Kaiser Steel the opportunity now to raise the illegality defense, and instead to subject Kaiser Steel to new duties and sanctions allegedly created by a statute that was not enacted or in effect until nearly three years after the 1974 agreement expired, would place Kaiser Steel in a substantially worse position than it would have been in had the new statute been in effect during the contract period.

Such prejudicial retroactive application of the new statute would be improper. In none of the cases cited by Respondents or the Solicitor General did a court give retroactive effect to a new statutory duty by imposing sanctions for breaches of that duty on account of conduct that occurred before the effective date of the statute. To the contrary, retroactive application of a new statute is especially disfavored where a party has relied on the prior law and application of the new law would prejudice his interests.[45]

Even under the standards of *Bradley*, retroactive application of Section 306(a) would result in "manifest injustice" and would therefore be impermissible.[46] *Bradley* made clear that manifest injustice could result where a new statute imposes "new and unanticipated obligations" upon a party on account of its past conduct.

---

[45] *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 316 (1945); *Welch v. Henry*, 305 U.S. 134, 147 (1938); *Milliken v. United States*, 283 U.S. 15, 21 (1931). *Cf. Allied Structural Steel Corp. v. Spannaus*, 438 U.S. 234, 249 (1978). The Solicitor General cites a number of cases regarding retroactive application of laws governing the legality of contracts. (S.G. Br. at 34.) In none of those cases, however, was there any indication that the party asserting the defense would have altered his conduct had he known the new law would apply. Moreover, in those cases the contracts at issue were lawful at the time enforcement of them was sought; here, in contrast, the purchase-of-coal clause is illegal, and the issue concerns only the availability of the illegality defense.

[46] *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974). *See also Greene v. United States*, 376 U.S. 149, 160 (1964).

(416 U.S. at 720.) The Court emphasized that the statute at issue there—in contrast to Section 306 as construed by Respondents and the Solicitor General—created "no change in the substantive obligation of the parties" (*id.* at 721) and that—in contrast to this case—there was no allegation that knowledge of the new statute "would have caused [the defendant] to order its conduct so as to render this litigation unnecessary" (*id.*).[47] It made clear that a different result would be called for where, as here, "additional or unforeseeable obligations" (*id.*), allegedly created by a new statute, are sought to be imposed retroactively.

CONCLUSION

For the foregoing reasons and those set forth in our opening brief, the Court of Appeals' decision should be reversed, and the case should be remanded for further proceedings to determine whether the purchase-of-coal clause is illegal.

Respectfully submitted,

ROBERT A. HAMMOND, III
A. DOUGLAS MELAMED *
LYNN BREGMAN
THOMAS W. WHITE

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Petitioner
Kaiser Steel Corporation

* *Counsel of Record*

Of Counsel:
RICHARD GARY
General Counsel
Kaiser Steel Corporation
300 Lakeside Drive
Oakland, California 94666

September 30, 1981

[47] The Solicitor General suggests that the obligations of Section 306 are not "new and unanticipated" because Kaiser Steel was aware that it might not prevail on the merits. S.G. Br. at 35. But Kaiser Steel was not aware that it would be retroactively barred from litigating the merits of its defenses altogether. Nor was it aware that its failure to comply with the purchase-of-coal clause would be retroactively subject to punitive sanctions. Here, unlike *Bradley*, Kaiser Steel "order[ed] its conduct" differently in reliance on the prior law and would be prejudiced by retroactive application of the new law.

Office-Supreme Court, U.S.
FILED
AUG 31 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION
Petitioner,

vs.

JULIUS MULLINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND

ALAN M. LEVY
GOLDBERG, PREVIANT, UELMEN, GRATZ,
MILLER, LEVY & BRUEGGEMAN S.C.
788 North Jefferson Street
Milwaukee, Wisconsin 53202
414/271-4500

Of Counsel:
GOLDBERG, PREVIANT, UELMEN, GRATZ,
MILLER, LEVY & BRUEGGEMAN S.C.
788 North Jefferson Street
Milwaukee, Wisconsin 53202

August, 1981

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Interest of the *Amicus Curiae*	1
Summary of Argument	2
Argument	4
The Employer's Obligation To The Trust Funds Which Protect Its Employees And Their Families Should Not Be Diminished By Its Disputes With Those Employees' Union	4
Conclusion	8

AUTHORITIES CITED

Cases

Audit Services, Inc. v. Stewart and James, 106 LRRM 2359 (Mont. Sup. Ct. 1981)	7
Bldg. Trades United Pension Trust Fund, et al. v. A.J.M. Construction Service, ____ F. Supp. ____, 87 L.C. ¶ 11,743 (E. Wis. 1979)	6
Carter v. CMTA-Molders Health and Welfare Trust, 489 F. Supp. 704 (N. Calif. 1980)	7
Central States Pension Fund v. H. W. Franke, ____ F. Supp. ____, 80 L.C. ¶12,017 (E. Mo. 1976)	6
Central States, Southeast and Southwest Areas Pension Fund v. Hitchings Trucking, Inc., 472 F. Supp. 1243, 1247 (E. Mich. 1979)	5,6
Contractors, Laborers, Teamsters, and Engineers Health and Welfare Plan v. Associated Wrecking Co., 638 F.2d 1128, (8th Cir. 1981)	7

Florida Marble Polishers Health and Welfare Trust Fund v. Megahee, ____ F. Supp. ____, 87 L.C. ¶11,735 (M. Fla. 1979) 7

Huge v. Long's Hauling Co., Inc., 442 F. Supp. 1041, 1043 (W. Pa. 1977), aff'd. 590 F.2d 457 (3rd Cir. 1978), cert. den. 442 U.S. 918 5

Huge v. Old Home Manor, Inc., 419 F. Supp. 1019, 1021 (W. Pa. 1976) 6

Lewis v. Benedict Coal Corp., 361 U.S. 459 3,4

Lewis v. Mill Ridge Coal, Inc., 298 F.2d 552, 557 (6th Cir. 1962) 5

Lewis v. Owens, 338 F.2d 740 (6th Cir. 1964) 4

Lewis v. Quality Coal Corp., 270 F.2d 140 (7th Cir. 1959), cert. den., 361 U.S. 929 4

Lewis v. Seanor Co., 382 F.2d 437 (3rd Cir. 1967) 4

Mearns v. Lewis, 168 F. Supp. 134 (W. Va. 1958), aff'd. 268 F.2d 427 (4th Cir. 1959) 4

Mullins v. Kaiser Steel Corp., 642 F.2d 1302 (D.C. Cir. 1980) 7

NLRB v. Amax Coal Co., ____ U.S. ____, 101 S. Ct. 2789 (1981) 5

Operating Engineers Local 139 Health & Welfare Fund, et. al v. James Gyuro Grading Co., Inc., ____ F. Supp. ____, 219 BPR A-3 (E. Wis. 1978) 6

Sheet Metal Industry Trust Fund v. Commerical Roofing and Sheet Metal, ____ F.2d ____, 91 L.C. ¶ 12,728 (D.C. Cir. 1981) 6

Teamsters Local 13 Health and Welfare Fund v. Hawg N Action, ____ F.2d ____, 107 LRRM 2865 (10th Cir. 1981) 7

Trust Fund Services v. Heyman, ____ F. Supp. ____ 79 L.C. ¶11,525 (Wash. Ct. Apps. 1976)..... 6

Vermeer v. Aloha Contractors, Inc., ____ F. Supp. ____, 90 L.C. ¶ 12,466 (Ore. 1980) 7

Western Washington Laborers-Employers Health and Security Trust Fund v. Newman, ____ F. Supp. ____, 90 L.C. ¶ 12,379 (W. Wash. 1980), at p. 25, 915..... 7

Statutes

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. 5

Labor Department Advisory Opinion Letter on Delinquent Contributions dated August 31, 1976, Opinion 76-89, 221 B.N.A. Pension Reporter R-24 5

Section 302 of the Taft-Hartley Act, 29 U.S.C. § 186 1

No. 80-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION
Petitioner,

vs.

JULIUS MULLINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND

INTEREST OF THE *AMICUS CURIAE*

The Central States, Southeast and Southwest Areas Pension Fund is a multi-employer pension fund, administered in accordance with Section 302 of the Taft-Hartley Act, 29 U.S.C. § 186, by a board of trustees composed of an equal number of employee and employer representatives. Almost 500,000 employees participate in the Central States Fund, of whom 20% are presently receiving benefits and the remainder are actively employed under collective bargaining agreements requiring employer contributions in their behalf for each week in which they work. Approximately 14,000 employers are bound to these

collective bargaining agreements, and the funding of benefits for their employees is based on the employers' contributions and the investment income earned from those contributions. Prompt and correct payment of these contributions is an important element of successful benefit funding in that contribution payment delinquencies (and consequent loss of investment income) limit resources available for all beneficiaries, especially in view of requirements that service credits toward benefits must be given to employees for time worked, regardless whether or when the contractually required contribution payments are received by the Fund. Thus, any policy which might permit delay of, or excuse from, those contribution payments would be adverse to any pension fund's interests. It is for this reason that the Central States, Southeast and Southwest Areas Pension Fund offers this brief *amicus curiae* in support of Respondent Trustees of the United Mine Workers of America Health and Retirement Funds.

Written consent for the Central States Fund's filing of this brief has been granted by counsel for all parties, and copies of these consents have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Trust funds like Respondents' herein provide benefits to employees and their families based on work already performed under a collective bargaining agreement. When an employer fails to make contributions to the fund, it necessarily limits available resources and thus affects the employee's level of benefits as well as the costs of contributing employers to provide the same benefits. Because recent legislation requires pension funds to grant service credits and consequent benefits on the basis of employee work performed, regardless whether contractually required contributions have actually been paid for that work, the economic impact of a contribution delinquencey, delay, or avoidance has become a serious threat to any fund's financial integrity.

This Court's decision in *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, has become the foundation for the well-established principle that an employer may not avoid its obligation to its employees' benefit trust fund by claiming a set-off due to a dispute with the employees' union. Any other policy would only penalize the employees and the funds for an argument to which they are not a party. For these reasons, Petitioner should not be permitted to abrogate its agreement to make contributions to an employee benefit trust simply because it questions the propriety of the collective bargaining agreement it has negotiated and accepted with the union which represents that fund's beneficiaries.

ARGUMENT

The Employer's Obligation To The Trust Funds Which Protect Its Employees And Their Families Should Not Be Diminished By Its Disputes With Those Employees' Union.

The gravamen of Petitioner's case is that allegedly unlawful provisions in its collective bargaining agreement with its employees' union excuse it from payment of contributions to the trust funds which must provide medical and retirement benefits to those employees and their families. Such attempts to avoid obligations to the Respondents' trust fund by raising arguments with the non-party union both frustrate legitimate fund processes and deny reasonable employee expectations. To permit Petitioner relief from its agreement to fund these programs is to invite every employer to delay and avoid its contributions under the guise of disputing its agreement with the union which is not even party to the action.

In *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, this court held that an employer may not moderate its obligation to an employee benefit trust fund by set-off of its claim against the union which negotiated the collective bargaining agreement creating that obligation; any other result would improperly cause "the burden...[to] fall in the first instance upon the employees and their families across the country." *Id.*, at 469. To prevent this unfair transferance of the employer-union dispute to the benefit trust funds and the uninvolved employers and employees they service, the courts have consistently ruled that a defense based on the employer-union dispute will not diminish the rights of the trust fund to seek the contributions owed pursuant to the challenged agreement, *Lewis* v. *Seanor Co.*, 382 F.2d 437 (3rd Cir. 1967); *Mearns* v. *Lewis*, 168 F. Supp. 134 (W. Va. 1958), aff'd 268 F.2d 427 (4th Cir. 1959); *Lewis* v. *Owens*, 338 F.2d 740 (6th Cir. 1964); *Lewis* v. *Quality Coal Corp.*, 270 F.2d 140 (7th Cir. 1959), *cert. den.*, 361 U.S. 929.

> "A fair reading of *Benedict* discloses the court's purpose to give the ultimate beneficiaries of the welfare fund (the men who mined the coal, and their dependents) a status that would insulate them from the consequences of a breach of contract by either the...union, as promisee, or the trustees of the Fund, as fiduciaries charged with the administration of the fund." *Lewis* v. *Mill Ridge Coal, Inc.*, 298 F.2d 552, 557 (6th Cir. 1962).

This dichotomy between fund and union has been reflected recently in another context in *NLRB* v. *Amax Coal Co.*, ____ U.S. ____, 101 S. Ct. 2789 (1981).

These needs to protect the funds and their beneficiaries are even more pressing since the passage of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*, which requires that pension funds grant service credits, and consequent benefits, to employees who have worked under an appropriate collective bargaining agreement regardless whether the required contributions have actually been paid. "Whether payments to the trust have or have not been made by the employer is not relevant in the determination as to whether or not an employee qualifies [for benefits]. See Labor Department Advisory Opinion Letter on Delinquent Contributions dated August 31, 1976, Opinion 76-89, 221 B.N.A. Pension Reporter R-24." *Central States, Southeast and Southwest Areas Pension Fund* v. *Hitchings Trucking, Inc.*, 472 F. Supp. 1243, 1247 (E. Mich. 1979).

To protect the funds and their beneficiaries many courts have gone so far as to enjoin payment of contributions, an action usually taken to assure prompt and continued payment of contributions regardless of any employer defenses (other than correct calculation of the obligation). Demonstrating this analysis is *Huge* v. *Long's Hauling Co., Inc.*, 442 F. Supp. 1041, 1043, (W. Pa. 1977), aff'd. 590 F.2d 457 (3rd Cir. 1978), *cert. den.* 442 U.S. 918, where an employer was enjoined from violating

the terms of a labor contract and severely limited in its disposition of assets—all in spite of the employer's pending counterclaim against the plaintiff funds' trustees. See also: *Huge* v. *Old Home Manor, Inc.*, 419 F. Supp. 1019, 1021 (W. Pa. 1976); *Bldg. Trades United Pension Trust Fund, et al.* v. *A.J.M. Construction Service,* ____ F. Supp. ____, 87 L.C. ¶11,743[1] (E. Wis. 1979); *Central States Pension Fund* v. *H.W. Franke,* ____ F. Supp. ____, 80 L.C. ¶12,017 (E. Mo. 1976); *Operating Engineers Local 139 Health & Welfare Fund, et al.* v. *James Gyuro Grading Co., Inc.,* ____ F. Supp. ____, 219 BPR A-3, (E. Wis. 1978).

It was with these concerns for the economic integrity of the trust fund in view of mandatory credits and consequent benefits that Judge Joiner stressed the fund's "anomalous position":

> "It would be no defense whatsoever to the [benefit] claims being made by the employees. As a result of this decision, it would be required to meet the financial burdens of ERISA's guarantee in the form of pension [benefit] payments without corresponding contributions.... As the plan covers several hundred thousand participants, with over 1400 contributing employers, the actuarial soundness of the Fund would be compromised." *Central States Pension Fund* v. *Hitchings, supra.*

The employer may not rely upon an allegation of an unfair labor practice by the union, a structural violation of the trust fund, or a lack of majority status to avoid its contribution obligations, *Trust Fund Services* v. *Heyman,* ____ F. Supp. ____, 79 L.C. ¶11,525, (Wash. Ct. Apps. 1976); *Sheet Metal Industry Trust Fund* v. *Commercial Roofing and Sheet Metal,*

---

[1]Decisions not yet published in the West Reporter service have been cited to the labor services of the Commerce Clearing House and the Bureau of National Affairs.

____ F.2d ____, 91 L.C. ¶12,728 (D.C. Cir. 1981); *Contractors, Laborers, Teamsters, and Engineers Health and Welfare Plan* v. *Associated Wrecking Co.*, 638 F.2d 1128, (8th Cir. 1981); *Audit Services, Inc.* v. *Stewart and James*, 106 LRRM 2359 (Mont. Sup. Ct. 1981). See also: *Teamsters Local 13 Health and Welfare Fund* v. *Hawg N Action*, ____ F.2d ____, 107 LRRM 2865, (10th Cir. 1981); *Carter* v. *CMTA-Molders Health and Welfare Trust*, 489 F. Supp. 704 (N. Calif. 1980); *Florida Marble Polishers Health and Welfare Trust Fund* v. *Megahee*, ____ F. Supp. ____, 87 L.C. ¶11,735 (M. Fla. 1979); *Vermeer* v. *Aloha Contractors, Inc.*, ____ F. Supp. ____, 90 L.C. ¶12,466 (Ore. 1980). The purpose of the trust is to protect the employees and their families, not to buffer an employer's dispute with the union; "An employer should not be permitted to abrogate the agreement retroactively after he has reaped all of his expected benefits from the agreement." *Western Washington Laborers-Employers Health and Security Trust Fund* v. *Newman*, ____ F. Supp. ____, 90 L.C. ¶12,379 (W. Wash. 1980), at p. 25,915.

The policies at issue here were well expressed in the instant litigation:

> "...the trustees of a union welfare fund are sometimes immune from contract defenses that could be asserted against the union itself because such a rule better serves the concern of federal labor policy to protect union members and their families from the actionable wrongs of their union representatives." *Mullins* v. *Kaiser Steel Corp.*, 642 F.2d 1302 (D.C. Cir. 1980), at 1312.

Any other rule would only limit fund resources for employees and their families; raise costs for employers who do not use these tactics to avoid contribution obligations based on work already performed; and invite unscrupulous employers to use the issues here in dispute as a pretext to excuse themselves from established collective bargaining agreements.

CONCLUSION

For these reasons, we respectfully urge the Court to reject the contentions of the Petitioner and to affirm the decision of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

ALAN M. LEVY
Goldberg, Previant, Uelmen, Gratz,
Miller, Levy & Brueggeman s.c.
788 North Jefferson Street
Post Office Box 92099
Milwaukee, Wisconsin 53202
414/271-4500

Of Counsel:

Goldberg, Previant, Uelmen, Gratz,
Miller, Levy & Brueggeman s.c.
788 North Jefferson Street
Milwaukee, Wisconsin 53202

Office-Supreme Court, U.S.
FILED
SEP 3 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KAISER STEEL CORPORATION,

Petitioner,

v.

JULIUS MULLINS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF CONSTRUCTION LABORERS TRUST FUNDS FOR SOUTHERN CALIFORNIA AND CARPENTERS TRUST FUNDS FOR SOUTHERN CALIFORNIA IN SUPPORT OF RESPONDENTS

JAMES P. WATSON
GEORGE M. COX
JOHN S. MILLER, JR.*

COX, CASTLE & NICHOLSON
2049 Century Park East
28th Floor
Los Angeles, California 90067
(213) 277-4222
Attorneys for *Amici Curiae*
Construction Laborers Trust
Funds for Southern California
and Carpenters Trust Funds
for Southern California

Of Counsel:

LIONEL RICHMAN, ESQ.
1625 W. Olympic Boulevard
Suite 810
Los Angeles, California 90015
(213) 388-5632
Attorneys for *Amici Curiae*
Construction Laborers Trust
Funds for Southern California

LAW OFFICES OF CHARLES P. SCULLY, INC.
CHARLES P. SCULLY
DONALD C. CARROLL
David Hewes Building, 11th Floor
995 Market Street
San Francisco, California 94103
(415) 362-0241
Attorneys for *Amici Curiae*
Carpenters Trust Funds
for Southern California

* *Counsel of Record*

PANDICK PRESS, WEST COAST, 1945 S. FIGUEROA, LOS ANGELES, CALIFORNIA (213) 747-4321

TABLE OF CONTENTS

PAGE

I. INTEREST OF THE *AMICI CURIAE* 1

II. SUMMARY OF ARGUMENT 3

III. FEDERAL PUBLIC POLICY PRECLUDES KAISER FROM ASSERTING THE "ILLEGALITY" DEFENSE 4

A. The Trust Funds Constitute A Special Class of Beneficiaries Accorded Preferential Treatment Under Federal Law And Federal Public Policy 4

B. Because of Federal Public Policy and the Preferential Treatment Accorded Trust Funds, Kaiser Cannot Raise the Illegality Defense In This Action 7

IV. IF KAISER IS PERMITTED TO CHALLENGE THE LEGALITY OF THE COLLECTIVE BARGAINING AGREEMENT IN THE PRESENT ACTION, IT WILL HAVE SUCCESSFULLY CIRCUMVENTED BOTH THE COLLECTIVE BARGAINING PROCESS AND ITS OWN CONTRACTUAL OBLIGATIONS 9

V. IF KAISER IS PERMITTED TO RAISE A SECTION 8(e) DEFENSE IN THIS ACTION, THE PRINCIPLE OF PRIMARY JURISDICTION WILL BE FRUSTRATED 14

VI. CONCLUSION 16

TABLE OF AUTHORITIES

CASES	PAGE
Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971)	6
Boyle v. North Atlantic Coal Corp., 331 F. Supp. 1107 (W.D. Pa. 1971)	7
Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947)	8
Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975)	13, 15, 16
Huge v. Long's Hauling Co., 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979)	4, 6, 7, 10, 16
Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960)	4, 8, 11, 13
Lewis v. Harcliff Coal Co., 237 F. Supp. (W.D. Pa. 1965)	7
Lewis v. Mill Ridge Coals, Inc., 298 F.2d 552 (6th Cir. 1962)	7, 13
Lewis v. Seanor Coal Co., 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968)	7
Lewis v. Splashdam By-Products Corp., 233 F. Supp. 47 (W.D. Va. 1964)	7
McMullen v. Hoffman, 174 U.S. 639 (1899)	8
Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971)	14
Mullins v. Kaiser Steel Corp., 642 F.2d 1302 (D.D.C. 1980)	13
NLRB v. Amax Coal Co., ____ U.S. ____, 101 S. Ct. 2789 (1981)	12
NLRB v. Haberman Construction Co., 641 F.2d 351 (5th Cir. 1981)(*en banc*)	11
National Stabilization Agreement of the Sheet Metal Industry Trust Fund v. Commercial Roofing & Sheet Metal, ____ F.2d ____, No. CA 78-1761 (D.C. Cir. 1981)	12
New Dyckman Theatre Corp. v. Radio Keith Orpheum, 16 F.R.D. 203 (S.D.N.Y. 1954)	13
Pennington v. United Mine Workers of America, 325 F.2d 804 (6th Cir. 1963), *rev'd on other grounds*, 381 U.S. 657 (1965)	7

CASES — PAGE

San Diego Building Trades Council v. Garmon, 359 U.S. 236, (1959) 14, 15

Sears, Roebuck and Company v. San Diego District Council of Carpenters, 436 U.S. 180 (1978) 15

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 5

Todd Shipyards Corp. v. Indus. Union of Marine & Ship Building Workers of America, 344 F.2d 107 (2d Cir. 1965) 13

Toensing v. Brown, 528 F.2d 69 (9th Cir. 1975) 12

United States v. Carter, 353 U.S. 210 12

United States Steel Corporation v. UMW, No. CA 75-1966 (D.D.C. 1977) 13

Viacom International, Inc. v. Tandem Productions, Inc. 526 F.2d 593 (2d Cir. 1975) 7, 11, 13

Waggoner v. Dallaire, ____ F.2d ____, No. CA 79-3542 (9th Cir. 1981) 12

Waggoner v. R. McGray, Inc. 607 F.2d 1229 (9th Cir. 1979) 7, 15, 16

STATUTES

Labor Management Relations Act of 1947, as amended:

29 U.S.C. § 185 15

29 U.S.C. § 186(c) 2, 3

National Labor Relations Act, Section 8(e), 29 U.S.C. § 158(e) ... 4

OTHER AUTHORITIES

A. Corbin, Contracts (One Vol. Ed. 1952) §§748, 754 6

Epstein, *Taft-Hartley Funds Coming of Age, Pensions & Investments*, October 18, 1979 6

Restatement of the Law of Contracts §140 (1932) 4

No. 80-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KAISER STEEL CORPORATION,

Petitioner,

v.

JULIUS MULLINS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF CONSTRUCTION LABORERS TRUST FUNDS FOR SOUTHERN CALIFORNIA AND CARPENTERS TRUST FUNDS FOR SOUTHERN CALIFORNIA IN SUPPORT OF RESPONDENTS

This brief in support of respondents is submitted with the written consent of counsel to both parties filed with the Clerk of the Court and pursuant to Rule 36.2 of the Rules of the Supreme Court.

I.

INTEREST OF THE *AMICI CURIAE*

Amici curiae Construction Laborers Trust Funds and Carpenters Trusts Funds are comprised of the following employee benefit plans:

Construction Laborers Pension Trust for Southern California

Laborers Health and Welfare Trust for Southern California

Construction Laborers Vacation Trust for Southern California
Laborers Training and Retraining Trust for Southern California
Carpenters Pension Trust for Southern California
Carpenters Health and Welfare Trust for Southern California
Eleven County Carpenters Vacation Savings and Holiday Plan
Carpenters Joint Apprenticeship and Training Committee Fund for Southern California

Each of these trusts is a multiemployer employee benefit plan created pursuant to collective bargaining between employers and unions; each was organized and is administered pursuant to the provisions of section 302(c) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 186(c).

The Construction Laborers Trust Funds and the Carpenters Trust Funds receive contributions from employers on behalf of covered employees pursuant to collective bargaining agreements entered into by various employers' associations and the Laborers International Union of North America, AFL-CIO and the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, respectively.

Over 22,000 carpenters are active participants in the Carpenters Pension Trust for Southern California. More than 12,000 individuals have retired and are currently receiving benefits from that Trust. The Construction Laborers Pension Trust for Southern California includes more than 25,000 active participants. Currently, in excess of 7,200 retired laborers are receiving pension benefits from that Trust.

Contributions to the Construction Laborers Trust Funds are made by approximately 3,000 employers. The Carpenters Trust Funds receive contributions from more than 2,700 employers.

Both the Construction Laborers Trust Funds and the Carpenters Trust Funds maintain active collection programs to enforce the right of the Trusts to receive contributions from employers that are delinquent in their contractually-required payments. These trusts routinely encounter the same types of defenses to their collection actions that have been raised by the petitioner in the present action.

II.

SUMMARY OF ARGUMENT

Amici wish to press three essential points of concern to all Taft-Hartley trust funds[1]:

(a) Common law principles of contract law do not apply in this case. Under federal law, Taft-Hartley trust funds are given a protected status. For this reason, federal law does not permit petitioner Kaiser Steel Corporation to raise "illegality" defenses to a collection action brought by a trust fund. Moreover, even under a common law analysis, public policy precludes Kaiser from raising an "illegality" defense.

(b) If Kaiser is permitted to litigate the "illegality" defense in the present action, the entire collective bargaining process contemplated by federal labor law will have been circumvented. Further, under federal labor law and policy and the terms of its agreement, Kaiser is obligated to raise the illegality of the "purchase of coal" excuse only in a context that would permit negotiation of an economically equivalent substitute. It failed to do so and is thus prevented from arguing illegality now.

---

[1] The term "Taft-Hartley trust funds" is a shorthand expression used to refer to employee fringe benefits trusts established pursuant to collective bargaining and administered pursuant to the strictures of section 302(c) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §186(c). ("The Taft-Hartley Act" or "LMRA").

(c) Under the doctrine of primary jurisdiction, Kaiser cannot litigate the issue whether the "purchase of coal" clause violates section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), in this proceeding.

III.

FEDERAL PUBLIC POLICY PRECLUDES KAISER FROM ASSERTING THE "ILLEGALITY" DEFENSE

A. *The Trust Funds Constitute A Special Class of Beneficiaries Accorded Preferential Treatment Under Federal Law And Federal Public Policy.*

In *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), this Court established the principle that Taft-Hartley trust funds are a special type of beneficiary of collective bargaining agreements. At common law, a promisor could assert any defense against a third party beneficiary that he could assert against the original promisee.[2] However, in *Lewis*, this Court refused to permit an employer to offset damages it claimed to have suffered as a result of the union's breach of its collective bargaining agreement against the employer's obligation to make trust fund contributions.

The Court held:

> This collective bargaining agreement, however, is not a typical third party beneficiary contract. The promisor's interest in the third party here goes far beyond the mere performance of its promise to that third party, i.e., beyond the payment of royalty. It is a commonplace of modern industrial relations for employers to provide security for employees and their families to enable them to meet problems arising from unemployment, illness, old age or death. . . .

---

[2] *See Restatement of the Law of Contracts* § 140 (1932), cited in *Huge v. Long's Hauling, Co.*, 590 F.2d 457, 459 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979).

> Moreover, unlike the usual third party beneficiary contract, this is an industrywide agreement involving many promisors. If Benedict and other coal operators having damage claims against the union for its breaches may curtail royalty payments, the burden will fall in the first instance upon the employees and their families across the country.

361 U.S. at 469.

Similarly, in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957), this Court held that in suits, such as this, under section 301 of the LMRA, the law that must be applied is "federal law, which the courts must fashion from the policy of our national labor laws."

The *Lewis* and *Lincoln Mills* holdings demonstrate that common law contract principles cannot be applied to trust fund collection disputes arising from collective bargaining agreements unless they are consistent with the federal law and policy favoring trust funds.

Significant reasons exist for the special judicial protection accorded Taft-Hartley trusts:

> With both the number of Americans in retirement and the duration of those nonremunerated years of their lives increasing, and with the cost of health care soaring, it has become ever more important to provide for those situations where the cost of living will no longer be satisfied from anticipated income . . . for millions of unionized employees, the chosen and preferred method for insuring against the privations of sickness, unemployment and old age has been the union welfare and pension funds. . . . [E]nsuring the viability of these funds and protecting the employees' investment from dissipation as a result of union or employer conduct or misconduct has for many years been a concern of the federal government . . . .

Huge v. Long's Hauling Co., 590 F.2d 457, 464-65 (3d Cir. 1978) (Adams, J., concurring), *cert. denied*, 442 U.S. 918 (1979).

The employees relying on the viability of these funds currently number more than 9.6 million.[3] Today, the 25 largest Taft-Hartley trust funds hold accumulated assets in excess of 11 billion dollars — a monumental sum, but one that pales in comparison to the magnitude of the future benefits promised by these trust funds. To fulfill their benefit promises, these trusts must receive the contributions committed by employers in the collective bargaining process.

Retired beneficiaries of trust funds are wholly dependent upon the ability of the trusts to secure these funds. Retirees are outside the collective bargaining unit and do not have even an indirect voice in the collective bargaining process. *See Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

Employers promise to contribute to trusts as consideration for the labor of their employees, the participants in the trusts. If contributions are not received for this labor, a potential forfeiture is created. This runs counter to the general judicial policy of avoiding forfeitures. *See* A. Corbin, Contracts (One Vol. Ed. 1952) §§ 748, 754. More importantly, in the special context of federal labor policy, the courts have recognized that it is fundamentally unfair for an employer to "surprise" employees by disavowing its obligation to make contributions after the employees have already performed their work. *Huge v. Long's Hauling Co.*, 590 F.2d at 465 (Adams, J., concurring).

---

[3] Epstein, *Taft-Hartley Funds Coming of Age, Pensions & Investments*, October 8, 1979. The same source notes that the United Auto Workers Pension Fund has over 330,000 retirees; the International Brotherhood of Electrical Workers has approximately 60,000 retirees; the United Mine Workers have approximately 85,000 retirees.

B. *Because of Federal Public Policy and the Preferential Treatment Accorded Trust Funds, Kaiser Cannot Raise the Illegality Defense In This Action.*

"The trustees of the fund, although technically third party beneficiaries, often can avoid contractual defenses that could be asserted against the union itself." *Huge v. Long's Hauling Co.*, 590 F.2d at 459. The majority of circuit court and district court opinions which have considered the issue have held that an employer may not, in the first instance, challenge the legality of provisions of a collective bargaining agreement as an affirmative defense to an action brought by trustees of a Taft-Hartley trust to collect delinquent contributions. *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979); *Lewis v. Seanor Coal Co.*, 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968); *Pennington v. United Mine Workers of America*, 325 F.2d 804 (6th Cir. 1963), *rev'd on other grounds*, 381 U.S. 657 (1965); *Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962); *Boyle v. North Atlantic Coal Corp.*, 331 F. Supp. 1107 (W.D. Pa. 1971); *Lewis v. Harcliff Coal Co.*, 237 F. Supp. (W.D. Pa. 1965); *Lewis v. Splashdam By-Products Corp.*, 233 F. Supp. 47 (W.D. Va. 1964).

This is not the first case in which courts have refused to consider a claim of illegality, founded upon an antitrust violation or otherwise, because it is untimely or made in litigation in which the alleged wrongdoer is not present. For example, in *Viacom International, Inc. v. Tandem Productions, Inc.*, 526 F.2d 593 (2d Cir. 1975), the court of appeals affirmed the refusal of a district court to entertain an antitrust defense to an action brought by an assignee of a contract controlling syndication and distribution rights to a television series. The court held that "other policies may override the need to prevent antitrust violations by not enforcing the contracts, where as here, the antitrust laws may be vindicated in a separate action." *Id.* at 598. The court further held:

> That procedure may be particularly appropriate where, as here, the alleged wrongdoer under the antitrust laws is not a party to the contract in dispute.

Id. See also Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947).

Kaiser's brief is based on the assumption that this case is governed not by federal labor law, but by a purportedly simple *common law* rule: "Courts will not enforce illegal contracts." Kaiser apparently believes that if it repeats this "rule" often enough, it can obscure its limitations and exceptions. *See, e.g.*, Brief of Petitioner at 11, 18, 19, 21-22. Further, Kaiser errs in assuming that a common law rule applies in a labor law context. In this case, as in *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), "a consideration which is not present in the case of other third-party beneficiary contracts is the impact of national labor policy." *Id.* at 470.

Even under a common law analysis, Kaiser is wrong. Kaiser places its principal reliance on the case of *McMullen v. Hoffman*, 174 U.S. 639 (1899), which refused to enforce a contract to share the profits from an illegal bid-rigging scheme. However, the *McMullen* opinion recognizes significant exceptions to the illegality defense, for example, where a party "had nothing to do whatever with the illegality of the original contract." *Id.* at 659. Moreover, the *McMullen* court denied enforcement of the contract before it only because it found that enforcement would yield a result contrary to public policy. In this case, the court of appeals found that public policy *requires* Kaiser to make the employee benefit contributions that it promised to make.

Kaiser fails to consider the most significant part of the *McMullen* opinion:

> The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but *only on account of the public interest.* It has been often stated in similar cases that *the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations, and in order the better to secure the public against dishonest transactions.*

Id. at 851 (emphasis added).

Significantly, Kaiser never takes issue with the holding of the court of appeals that strong public policy considerations require Kaiser to make the employee benefit contributions that it promised to make. As Kaiser appears to concede, all public policy considerations must be resolved in the Trustees' favor. No public policy reason exists for permitting Kaiser to raise an illegality defense.

IV.

IF KAISER IS PERMITTED TO CHALLENGE THE LEGALITY OF THE COLLECTIVE BARGAINING AGREEMENT IN THE PRESENT ACTION, IT WILL HAVE SUCCESSFULLY CIRCUMVENTED BOTH THE COLLECTIVE BARGAINING PROCESS AND ITS OWN CONTRACTUAL OBLIGATIONS.

Kaiser argues at length that if the lower court is deprived of authority to hear Kaiser's affirmative defenses on the merits, the courts' power to hear and dispose of the entire controversy will have been unconstitutionally infringed. Brief of Petitioner at 44-47. Thus, Kaiser maintains, it is left with "the prospect that [it] may be compelled to comply with a contract clause the lawfulness of which *no court* has been able to review." Brief of Petitioner at 45; (emphasis in original).

Kaiser's argument completely misses the point. The issue is not *whether* Kaiser can challenge the legality of its collective bargaining agreement under federal labor and antitrust laws, but *when* and *against which parties* it may do so (and in *what forum, see* section V, *infra*).

If it desired to contest the "purchase of coal" clause, Kaiser should have sued the Union *during* the life of the contract and for *prospective* rather than retroactive relief. Nothing in the opinion of the court of appeals suggests that Kaiser would have

been deprived of its right to litigate the illegality issue if it had brought such a timely action against the Union. To the extent that Kaiser now has no way to avoid making payments under the "purchase of coal" clause, it has no one but itself to blame.

As Judge Adams stated in his concurrence in *Huge v. Long's Hauling Co.*, 590 F.2d at 465:

> Finally, it appears preferable as a matter of judicial administration to *require that the employer sue the union directly* if it believes it has reason to be excused from performing under the labor agreement, instead of permitting it to assert its claim by way of defense against the trustees. The employer dealt with the union and bases its case on those dealings. Clearly, the enforceability of the labor agreement can better be ascertained in the context of a lawsuit to which the principal actors are parties than in one where one party, the trustees, does not have first-hand knowledge of the material facts.

(Emphasis added) (footnote omitted).

In this case, Kaiser appears to have expressly covenanted with the Union to resolve any objections to the "purchase of coal" clause by direct action against the Union *during* the life of the contract. Kaiser agreed to the very clause which it now contests. It further agreed expressly in the collective bargaining agreement to negotiate a substitute for the clause if it was held unlawful. Brief of Petitioner at 5.

Kaiser not having obtained a finding that the clause was unlawful during the life of the contract, the Union had no need or means to renegotiate any form of substitute consideration for the labor rendered by its members. Kaiser's time for voicing its objection passed as the contract passed.

Given the terms of its collective bargaining agreement, Kaiser must be held to have bargained away any right it might have had to raise the alleged illegality of the "purchase of coal"

clause as a defense to the Trustees' collection action. This Court held, in a similar context, that "the parties to a collective bargaining agreement must express their meaning in unequivocal words" before they can be said to have agreed that an employer can raise unlawful union conduct as a defense in a trust fund collection action. *Lewis v. Benedict Coal Corp.*, 361 U.S. at 470-71. The principle of the *Lewis* case applies here. Kaiser did not "in unequivocal words" preserve the right to challenge the "purchase of coal" clause outside of the collective bargaining context. Thus, it cannot now do so.

To permit Kaiser to do otherwise would be manifestly inequitable. An employer demonstrates an intention to be bound by the terms and obligations of a collective bargaining agreement when it receives the benefits and appears to abide by the provisions of that agreement. *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 356 (5th Cir. 1981) (*en banc*). By choosing not to protest the "purchase of coal" clause during the life of the agreement at a time when the Union could have negotiated substitute compensation as agreed, Kaiser created the expectation in its employees that they would be compensated in the manner prescribed by the agreement.

Thus, Kaiser partook of the benefit of labor peace and the right to employ union labor and secured the actual performance of labor over the entire life of the collective bargaining agreement. Having enjoyed the benefit of its bargain, Kaiser cannot now refuse to pay the price. In the words of the Second Circuit, Kaiser cannot "reap the benefits of a contract and then seek to avoid the corresponding burdens." *Viacom International, Inc. v. Tandem Productions, Inc.*, 526 F.2d at 599.

A holding to the contrary in this case will enable Kaiser to repudiate its obligation to contribute after the contract has expired. It will result in Kaiser receiving the labor of its work force for a price hundreds of thousands of dollars less than that which it agreed to pay under the collective bargaining agreement. In these circumstances, equity requires that Kaiser be

estopped to raise the illegality defense. *See National Stabilization Agreement of the Sheet Metal Industry Trust Fund v. Commercial Roofing & Sheet Metal,* ____ F.2d ____, No. CA 78-1761 (D.C. Cir. 1981).

Broader considerations support the equity of denying Kaiser's illegality defense. Trustees are ill-equipped to litigate issues which only the collective bargaining parties can properly resolve. The trustees of a Taft-Hartley trust are not "collective bargaining representatives" of either the union or the employer. *NLRB v. Amax Coal Co.,* ___ U.S. ____, 101 S. Ct. 2789 (1981)[4]. Moreover, as a matter of federal law, neither the union nor its representatives are agents of the trust funds created by a collective bargaining agreement. *Waggoner v. Dallaire,* ____ F.2d ____, No. CA 79-3542 (9th Cir. 1981). Trustees owe their undivided loyalty to the trust funds and their participants. *NLRB v. Amax Coal Co., supra.* Consequently, the trustees must live with the language of a collective bargaining agreement which they did not construct and whose legal infirmities they cannot remedy.

Yet, trust funds must monitor and enforce[5] the contribution obligations of a multitude of employers.[6] To permit Kaiser to raise its defense in this action is to offer every employer the opportunity to "lie in the weeds," ignoring its obligation to contribute, with the knowledge that if it is discovered it will have the independent ability to raise in defense complex and abstruse questions of labor and antitrust law. As the court of appeals noted in this case, the litigation of

---

[4] This is true even if, in some cases, collective bargaining representatives also serve as trustees. In their capacity as trustees, they are obligated by federal law to exercise their independent judgment in administering a Taft-Hartley trust. *Toensing v. Brown,* 528 F.2d 69, 72 (9th Cir. 1975).

[5] "Indeed, the Trustees have an obligation to *enforce* the terms of the collective bargaining agreement regarding employee fund contributions against the employer 'for the sole benefit of the beneficiaries of the Fund.' *United States v. Carter,* 353 U.S. 210, 220." *NLRB v. Amax Coal Co.,* ____ U.S. ____, ____, 101 S. Ct. 2789, 2798 (1981) (Emphasis in original)

[6] As stated earlier, *amici* collectively receive contributions from and must monitor more than 5,000 employers.

difficult antitrust and labor law issues is a time-consuming and expensive process. Forcing the trustees to deal with these complex issues entails the potential dissipation of trust fund assets on litigation costs. The injection of these issues into simple collections actions would increase the cost of litigation manifold.[7]

Kaiser's lament that affirmance of the decision below will deprive it of a judicial forum simply cannot withstand scrutiny. Kaiser's collective bargaining agreement reveals the means by which the legality of the "purchase of coal" clause could be tested. It would have been a simple matter for Kaiser to litigate the issue in a prospective manner by filing a declaratory relief action against the United Mine Workers.[8] Then, if Kaiser had prevailed, the parties could have negotiated the substitute consideration as called for by their agreement.

---

[7] As one district court has noted, an antitrust claim "becomes a springboard from which the parties dive off into an almost bottomless sea of interrogatories, depositions, and pretrial proceedings on collateral issues . . ." *New Dyckman Theatre Corp. v. Radio Keith Orpheum*, 16 F.R.D. 203, 206 (S.D.N.Y. 1954). The Second Circuit confirms "[i]t is well known that the litigation of antitrust issues is more likely to involve lengthy and expensive proceedings, both before trial and at trial, than any other kind of federal court litigation." *Viacom International, Inc. v. Tandem Productions*, 526 F.2d 593, 599 (2d Cir. 1975). In view of the policy expressed in *Lewis v. Benedict Coal, Corp.*, 361 U.S. 459 (1960) that trust fund beneficiaries should be shielded from the consequences of union and employer wrongs, the legal cost of defending the legality of the collective bargaining agreement should not be extracted from trust fund assets. *See also Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d 552, 557 (6th Cir. 1962) (the purpose of *Lewis v. Benedict Coal Corp.* was to insulate beneficiaries of the trust fund from consequences of breach of contract by either union or trustees).

[8] That is what the employers did in *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), and in *Todd Shipyards Corp. v. Indus. Union of Marine & Ship Building Workers of America*, 344 F.2d 107 (2d Cir. 1965). In fact, one employer bound by an agreement containing the "purchase of coal" clause *did* file suit against the UMW to obtain declaratory relief; the suit resulted in a judgment that the purchase of coal clause *did not* violate the Sherman Act; *United States Steel Corporation v. UMW*, No. CA 75-1966 (D.D.C. 1977), cited in *Mullins v. Kaiser Steel Corp.*, 642 F.2d 1302, 1312 (D.D.C. 1980).

However, Kaiser rejected this route. Instead, it chose to gamble that the Trustees would never seek to collect the money owed to the Trust under the purchase of coal clause.

V.

IF KAISER IS PERMITTED TO RAISE A SECTION 8(e) DEFENSE IN THIS ACTION, THE PRINCIPLE OF PRIMARY JURISDICTION WILL BE FRUSTRATED.

The desire to shield the system of national labor relations from conflicting regulation prompted this Court to hold:

> When an activity is arguably subject to §7 or §8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . .

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959).

The Court has recognized the need for this doctrine of primary jurisdiction to delineate areas of conduct that must be free in the first instance from state and federal court regulation if national labor policy is to be left unhampered. The Court's decisions have adopted a policy of avoiding "conflicting regulation of conduct by various official bodies which might have some authority over the subject matter."[9] *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 285-86 (1971); *see also San Diego Building Trades Council v. Garmon*, 359 U.S. at 246.

---

[9] Underlying this logic is more than just a concern to avoid conflicting decisions. The Court has recognized that conflict in technique can be fully as disruptive to the system of national labor laws as conflict in overt policy, for "[t]he technique of administration and the range and nature of those remedies that are and are not available is a fundamental part and parcel of the operative legal system established by the National Labor Relations Act." *Motor Coach Employees v. Lockridge*, 403 U.S. at 287. Indeed, "[a]dministration is more than a means of regulation; administration is regulation." *San Diego Building Trades Council v. Garmon*, 359 U.S. at 243.

Application of the primary jurisdiction doctrine is especially appropriate in this case.[10] In the recent case of *Sears, Roebuck and Company v. San Diego District Council of Carpenters*, 436 U.S. 180, 202 (1978), this Court restated the rule that "[t]he primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board." The same rule applies to the federal courts. *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229, 1233, n. 4 (9th Cir. 1979); *see also San Diego Building Trades Council v. Garmon*, 359 U.S. at 245. Here, Kaiser's assertion that the "purchase of coal" clause violates section 8(e) of the National Labor Relations Act raises precisely the same issues and questions which the NLRB would have decided if Kaiser had initially brought an unfair labor practice charge before the Board.

In *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626 (1975), this Court held that federal courts may decide labor law questions that emerge as collateral issues in suits brought under other federal statutes. However, *Connell* is inapposite here, where the section 8(e) issue forms a wholly separate defense to enforcement of the collective bargaining agreement.

In *Connell* the employer signed, under protest, an allegedly illegal subcontracting agreement with the union, then immediately brought a federal antitrust action against the union in an effort to void the agreement. The union contended that the agreement was explicitly allowed by the "construction industry proviso" to section 8(e) and was therefore immune to federal antitrust challenge. Thus, before the Court could determine whether the employer's antitrust claim was valid, it had to decide the collateral section 8(e) issue raised by the union.

---

[10] Under section 301 of the LMRA, 29 U.S.C. § 185, state courts have concurrent jurisdiction with federal courts over collections actions brought by the trustees of Taft-Hartley trusts against delinquent employers. It is particularly inappropriate for state courts, with virtually no expertise in interpreting the National Labor Relations Act to become involved in the intricacies of section 8(e) and other highly technical provisions of the Act.

Here, in contrast, Kaiser is raising section 8(e) as a wholly separate, alternative defense, distinct from the antitrust defense. There is no need to decide the section 8(e) issue before the separate antitrust issue can be addressed. *Huge v. Long's Hauling Co.*, 590 F.2d at 461.

Additionally, in *Connell* there was no claim that section 8(e) had been violated. Rather, the union asserted that section 8(e) *protected* the agreement from the antitrust laws. The NLRB could not have made such a determination, since it does not have jurisdiction to decide the scope of section 8(e), absent an unfair labor practice charge before it. Therefore, the collateral labor law issue could not have been addressed by the Board in *Connell*. Here, Kaiser could have brought the section 8(e) issue before the Board, but chose not to do so.

In effect, by foregoing its opportunity to bring an unfair labor practice charge before the NLRB and instead belatedly trying to assert section 8(e) as collateral matter, Kaiser is attempting (long after expiration of the National Labor Relations Act's six-month statute of limitations) to "bootstrap itself into a position to litigate in district court claims within the NLRB's primary jurisdiction simply by adding unrelated antitrust allegations." *Huge v. Long's Hauling Co.*, 590 F.2d at 461. Allowing Kaiser to assert a section 8(e) violation as a collateral matter would usurp the NLRB's primary jurisdiction and open the door for any party to litigate labor law claims within the Board's primary jurisdiction in federal court by just tacking on a separate antitrust claim. Such a holding would "encourage parties to circumvent the congressionally-established scheme for resolution of unfair labor practice disputes by the NLRB." *Waggoner v. R. McGray, Inc.*, 607 F.2d at 1236.

VI.

CONCLUSION

Amici curiae urge this Court to find that Kaiser has raised its claims against the wrong parties, at the wrong time and in the wrong forum.

A finding in favor of Kaiser will necessarily encourage employers to enter into collective bargaining agreements, thereby purchasing labor peace, while harboring no intention of paying the agreed-upon price. Further, to allow an employer to assert his objections to a collective bargaining agreement retroactively as defenses to his obligation to contribute for labor already performed is to reward deceit and encourage *every* delinquent employer to ignore its obligations until discovered and then, if discovered, to protract and complicate the trusts' collection actions with whatever objections can be manufactured.

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

JAMES P. WATSON
GEORGE M. COX
JOHN S. MILLER, JR.*
COX, CASTLE & NICHOLSON
Attorneys for ***Amici Curiae*** *Construction Laborers Trust Funds and Carpenters Trust Funds*

Of Counsel:
LIONEL RICHMAN, ESQ.
1625 W. Olympic Boulevard
Suite 810
Los Angeles, California 90015
(213) 388-5632
Attorneys for ***Amici Curiae*** *Construction Laborers Trust Funds for Southern California*

Law Offices of CHARLES P. SCULLY, INC.
CHARLES P. SCULLY
DONALD C. CARROLL
David Hewes Building, 11th Floor
995 Market Street
San Francisco, California 94103
(415) 362-0241
Attorneys for ***Amici Curiae*** *Carpenters Trust Funds for Southern California*

---

* *Counsel of Record*

Office-Supreme Court, U.S.
FILED
AUG 31 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION,

Petitioner,

v.

JULIUS MULLINS, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

BRIEF OF INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, *AMICUS CURIAE*

HARRISON COMBS
WILLARD P. OWENS*
A. RANDALL VEHAR
900 - 15th Street, N.W.
Washington, D.C. 20005
(202) 842-7330
Counsel for International Union, United Mine Workers of America, Amicus Curiae

**Counsel of Record*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

	Page
THE INTEREST OF THE INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA	1
STATEMENT OF THE CASE	3
History of the Dispute	4
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. IN A CONTRACT ENFORCEMENT ACTION BY HEALTH AND RETIREMENT PLAN TRUSTEES, STATE COURTS AND FEDERAL COURTS, IN THE FIRST INSTANCE, DO NOT HAVE JURISDICTION TO DETERMINE WHETHER CONTRACTUAL PROVISIONS ARE UNFAIR LABOR PRACTICES	10
A. Congress and This Court Recognize, While Section 8(e) and Antitrust Actions or Defenses May Be Raised Against the Union in the Proper Forums, That Overriding Public Policy Concerns Do Not Support Such Defenses in Trustee Enforcement Actions	11
B. The Purchase-of-Coal Provision Requiring Retirement and Benefit Contributions Should Be Presumed Legal and Enforceable, Since the Proper Agency Has Not Rendered the Provision Void	14
C. Permitting Employers to Raise a Section 8(e) Defense in Trustee Enforcement Actions Might Impermissibly Extend Jurisdiction over Federal Unfair Labor Practices to State Courts	20
II. KAISER HAS NOT ALLEGED FACTS SUFFICIENT TO REBUT THE PRESUMED LEGALITY OF THE PURCHASER-OF-COAL PROVISION	21
III. A FEDERAL ANTITRUST DEFENSE MAY NOT BE RAISED BY KAISER IN A HEALTH AND RETIREMENT TRUSTEES' ENFORCEMENT ACTION, WHETHER BROUGHT IN FEDERAL OR STATE COURT	24
CONCLUSION	27
APPENDIX A	1a

TABLE OF AUTHORITIES

CASES: Page

Amalgamated Meat Cutters v. *Jewel Tea Co.*, 381 U.S. 676 (1965) 18-20, 25-26

Appalachian Power Co. v. *Regional Properties, Inc.*, 364 F.Supp. 1273 (D.Va. 1973) 26

Associated General Contractors & Teamsters, 227 N.L.R.B. 269 (1976) 21

Associated General Contractors v. *Otter Tail Power Co.*, 611 F.2d 684 (8th Cir. 1979) 20

Azalea Drive-In Theatre v. *Sargoy*, 215 Va. 714, 214 S.E.2d 131 (1975), *cert. denied*, 423 U.S. 940 (1975) 26

Ball v. *Victor Adding Machine Co.*, 236 F.2d 170 (5th Cir. 1956) 24

Bayside Enterprises, Inc., v. *NLRB*, 429 U.S. 298 (1977) . 10

Berggren v. *Sun Oil Co.*, 79 F.R.D. 87 (E.D. Wis. 1978) . 25

Brotherhood of Railroad Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969) 10

Bruce's Juices v. *American Can Co.*, 330 U.S. 743 (1947) 14-16, 24-26

Complete Auto Transit, Inc. v. *Reis*, ___ U.S. ___, 49 U.S.L.W. 4473 (1981) 13

Connell Construction Co. v. *Plumbers & Steamfitters*, 421 U.S. 616 (1975) 15, 17-20

Davis v. *Alabama Power Co.*, 383 F.Supp. 880 (N.D. Ala. 1974) 24

Dixie Mining Co., 165 N.L.R.B. 467 (1967) 4-6

Dixie Mining Co., 188 N.L.R.B. 753 (1971) ..... *passim*

Fibreboard Paper Products Corp. v. *NLRB*, 379 U.S. 203 (1964) 22

First National Maintenance Corp. v. *NLRB*, ___ U.S. ___, 49 U.S.L.W. 4769 (1981) 22

Freeman v. *Bee Machine Co.*, 319 U.S. 448 (1943) 26

General Investment Co. v. *Lake Shore & Michigan Southern Railway Co.*, 260 U.S. 261 (1922) 26

General Talking Pictures Corp. v. *DeMarce*, 203 Minn. 28, 279 N.W. 750 (1938) 26

Table of Authorities Continued

Page

Inland Steel Co. v. *NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949) 24

International Union, UMWA (Consolidation Coal Co.), NLRB Case No. 6-CE-17 (March 28, 1979) (charge dismissed) 8, 16

International Union, UMWA v. *NLRB*, 399 F.2d 977 (D.C. Cir. 1968) 6

International Union, UMWA v. *NLRB*, 468 F.2d 1139 (D.C. Cir. 1972) and *sub nom. U.S. Steel Corp.* v. *NLRB*, No. 73-1700 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 983 (1974) 6

Kelly v. *Kosuga*, 358 U.S. 516 (1959) 14-15, 24-26

Lewis v. *Benedict Coal Corp.*, 361 U.S. 459 (1960) .... *passim*

Lewis v. *NLRB*, 350 F.2d 801 (D.C. Cir. 1965) 5

Lyons v. *Westinghouse Electric Corp.*, 222 F.2d 184 (2d Cir. 1955) 26

Miller v. *Granados*, 529 F.2d 393 (5th Cir. 1976) 26

Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) 16

Mullins v. *Kaiser Steel Corp.*, 642 F.2d 1302 (D.C. Cir. 1980) 4, 7, 8

National Woodwork Manufacturers v. *NLRB*, 386 U.S. 612 (1967) 15, 22

NLRB v. *Amax Coal Co.*, ___ U.S. ___, 49 U.S.L.W. 4880 (1981) 16

NLRB v. *Erie Resistor Corp.*, 373 U.S. 221 (1963) 10

NLRB v. *International Longshoremen's Ass'n*, 447 U.S. 490 (1980) 11, 18

NLRB v. *Pipefitters*, 429 U.S. 507 (1977) 10

Occidental Life Insurance Co. v. *Pat Ryan & Assoc., Inc.*, 496 F.2d 1255 (4th Cir. 1974), *cert. denied*, 419 U.S. 1023 (1974) 16

Pennington v. *UMWA*, 325 F.2d 804 (6th Cir. 1963), *reversed in part*, 381 U.S. 659 (1965), *cert. denied in relevant part sub nom. Pennington* v. *Lewis*, 381 U.S. 949 (1965) 12, 14-16

Table of Authorities Continued

	Page
Puerto Rico v. *Shell Co.*, 302 U.S. 253 (1937)	26
Raymond O. Lewis, 144 N.L.R.B. 228 (1963)	5
Raymond O. Lewis, 148 N.L.R.B. 249 (1964)	5, 6
Riverton Coal Co. v. *UMWA*, 79 L.R.R.M. 2348 (S.D. Ohio 1970), *rev'd*, 453 F.2d 1035 (6th Cir. 1972), *cert. denied*, 407 U.S. 915 (1972)	22, 23
Smith v. *Evening News Ass'n*, 371 U.S. 195 (1962)	18
South-East Coal Co. v. *Consolidation Coal Co.*, 434 F.2d 767 (6th Cir. 1970)	8
Tennessee Consolidated Coal Co. v. *UMWA*, 416 F.2d 1192 (6th Cir. 1969), *cert. denied*, 397 U.S. 964 (1970)	8
UMWA (BCOA), 179 N.L.R.B. 479 (1969)	22
UMWA v. *Coronado Coal Co.*, 259 U.S. 344 (1922)	2
UMWA v. *Pennington*, 381 U.S. 657 (1965)	8, 15
Union Oil Co. v. *Chandler*, 4 Cal.App.3d 716, 84 Cal. Rptr. 756 (1970)	19, 26
United States Steel Corp. v. *International Union, UMWA*, Civil No. 75-1966 (D.D.C. 1977)	7, 1a-5a
Vaca v. *Sipes*, 386 U.S. 171 (1967)	18
Vaughn Co., Ltd. v. *Saul*, 143 Ga. App. 74, 237 S.E.2d 622 (1977)	26
Walsh v. *Schlect*, 429 U.S. 401 (1977)	15, 25

STATUTES	Page
National Labor Relations Act, as amended 29 U.S.C. §§151, *et seq.* (1973)	
Section 8(b), 29 U.S.C. §158(b)	15
Section 8(e), 29 U.S.C. §158(e)	*passim*
Section 10(b), 29 U.S.C. §160(b)	19
Section 10(l), 29 U.S.C. §160(l)	14, 16, 17
Section 14(b), 29 U.S.C. §164(b)	17
Section 14(c), 29 U.S.C. §164(c)	9, 20
Section 301, 29 U.S.C. §185	13, 18

Table of Authorities Continued

Page

Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, Pub. L. No. 86-257, 73 Stat. 525 (1959) (codified in scattered sections of 29 U.S.C.) (1973)

Section 8(e), 29 U.S.C. §158(e) ..... *passim*

Section 10(l), 29 U.S.C. §160(l) 14, 16, 17

Section 14(c), 29 U.S.C. §164(c) 9, 20

Labor Management Relations (Taft-Hartley) Act, 61 Stat. 136 (1947), 29 U.S.C. §141, *et seq.* (1973)

Section 10(l), 29 U.S.C. §160(l) 14, 16, 17

Section 14(b), 29 U.S.C. §164(b) 17

Section 301, 29 U.S.C. §185 ..... 13, 18

Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (codified at 29 U.S.C. §1001a, *et seq.*) (1981 Supp.) 9, 16, 17, 23

Section 411(c), 29 U.S.C. §1103(c)(2)(A)(ii) 17

Sections 4211(d)(2) and 4216, 29 U.S.C. §§1391(d)(2) and 1396 (1981 Supp.). 23

Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978) (amending 30 U.S.C. § 901, *et seq.*) (1981 Supp.) 23

Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, § 3(a)-(c), 92 Stat. 12 (1978) (codified at 30 U.S.C. § 934a (1981 Supp.) 23

Norris-LaGuardia Act, 29 U.S.C. §101, *et seq.* (1973)

Section 6, 29 U.S.C. §106 25

Sherman Antitrust Act, 15 U.S.C. §1, *et seq.* (1973)

Section 4, 15 U.S.C. § 4 ..... 4, 26, 1a, 2a

Clayton Act, 15 U.S.C. §12, *et seq.* (1973)

Section 16, 15 U.S.C. § 26 19

LEGISLATIVE MATERIALS

96 CONG. REC. S10,105 (daily ed. July 29, 1980) (remarks of Sen. Randolph) 2, 13, 23

96 CONG. REC. H7899 (daily ed. Aug. 26, 1980) (remarks of Rep. Thompson) 11-13, 20, 26

Table of Authorities Continued

Page

National Labor Relations Board, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* (1959) 20

Black Lung Reform Act and Black Lung Benefits Revenue Act of 1977, Committee on Education and Labor, House of Representatives, Committee Print, Leg. His., 96th Cong. (Feb. 1979) 23

Hearings on H.R. 3904, the Multiemployer Pension Plan Amendments Act of 1979, before the Task Force on Welfare and Pension Plans, Committee on Education and Labor, House of Representatives, 96th Cong., 1st Sess. (June 5 and 7, 1979) 23

MISCELLANEOUS

43 Fed. Reg. 36,803 (Aug. 18, 1978) 23

20 C.F.R. § 725.491(b)(2) (1981) 23

Note, *Secondary Boycotts and Work Preservation*, 57 VA. L. REV. 1280 (1971) 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1345

KAISER STEEL CORPORATION,

Petitioner,

v.

JULIUS MULLINS, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

BRIEF OF INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, *AMICUS CURIAE*

THE INTEREST OF THE INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA

The International Union, United Mine Workers of America (hereinafter "UMWA"), is the collective bargaining agent for approximately 160,000 members employed in coal mines covered by collective bargaining agreements in the bituminous coal industry. As such, it negotiated, and is a party to, the National Bituminous Coal Wage Agreement of 1974 (hereinafter "1974 Agreement"), the agreement under which the Trustees of the UMWA Health and Retirement Funds (hereinafter "Trustees") seek herein to collect royalties due the Funds under the "purchase-of-coal clause" in the 1974 Agreement.

The interest of the UMWA in this litigation, prompting the filing of this brief, amicus curiae, supporting the respondents

Trustees, is UMWA's deep and continuing interest in safeguarding the integrity of all collective bargaining agreements executed by it on behalf of its members. UMWA has sought for many years to protect its members from the ever-encroaching evils and practices of signatory operators subcontracting coal lands and coal-producing facilities and purchasing coal from nonsignatory operators, which undermine its members' tenure of employment, wage standards, fringe benefits, and other working conditions set forth in UMWA's national agreements.[1] The "purchase-of-coal clause" at issue here is but one of many clauses which the UMWA has, over the years, negotiated to seek this objective. UMWA must protect its members from the practice of operators who, after UMWA has bargained for this clause, violate their bargaining commitments and seek financial windfalls at their employees' expense. The "purchase-of-coal clause" requires royalties to be paid into the Benefit and Pension Funds established in 1950, the first multiemployer funds of their kind in the United States. Billions of dollars have been paid to the beneficiaries of these Funds. More than 100,000 coal mining families are being served by the 1950 and 1974 Funds. Presently, approximately 70,000 miners are receiving pensions from the 1950 Pension Trust, while approximately 14,000 are receiving pensions from the 1974 Pension Trust. The 1950 Benefits Trust had approximately 190,000 beneficiaries in 1980. These benefits are based upon an industry-wide concept, with pension benefits paid after specified service *in the industry*, not just service for a *single employer*.[2]

[1] Language in *UMWA* v. *Coronado Coal Co.*, 259 U.S. 344, 396 (1922), demonstrates it as one arising out of a subcontract for just such a purpose. The Bituminous Coal Operators Association has also expressed concern in another setting regarding the effect on their sector of the coal industry caused by possible cost differentials arising out of the UMWA Funds. See n. 31 *infra*.

[2] The 1950 Funds, for instance, support almost 20,000 retirees, who may have as little as five (5) years of signatory service, so long as they have a total of twenty (20) years of total coal mine employment. 96 CONG. REC. S10,105 (daily ed. July 29, 1980) (remarks of Sen. Randolph).

The cost of the 1950 Funds and the 1974 Funds represents the *single* largest cost differential between UMWA mines and nonsignatory mines. The reason for this differential is that pension plans, if any, of nonsignatories cover only employees and retirees of the single employer and their years of qualified service are based only on the service of the single employer. Few, if any, ever achieve the required years of service necessary to qualify for pension benefits. In addition, these plans often do not include medical payments to already retired miners, as do the UMWA Funds. Thus, the royalty on purchased coal, which is equivalent to the royalty paid on coal produced for sale or use, reasonably represents the differential in labor costs between mines under the Agreement and those not. C.A.J.A. 568, 572.[3] UMWA's interest is to protect those beneficiaries already retired and the employee-members now receiving health benefits and gaining service credit at all bituminous mines. By this negotiated and agreed payment on purchased coal, UMWA has thus increased and enhanced the ability of the Funds to pay the benefits then available and perhaps in the future to increase and expand them.

STATEMENT OF THE CASE

The Trustees brought suit against the Kaiser Steel Corporation (hereinafter "Kaiser") seeking payment of contributions due these Funds under the terms of the 1974 Agreement. The 1974 Agreement was first negotiated between UMWA and the Bituminous Coal Operators Association (hereinafter "BCOA"), a multiemployer bargaining unit. Kaiser, as a member of BCOA, became a signatory operator to the 1974 Agreement. As part of that Agreement, Article XX(d)(v) provided that a signatory operator pay a specified royalty on each ton of coal procured or acquired for sale or use for which no contribution had been made to the appropriate Trusts, as

[3] References to appendices to the Petition for Certiorari are cited as "Pet. App. ____"; references to Joint Appendix filed herein are cited as "J.A. ____"; references to Joint Appendix filed in the Court of Appeals are cited as "C.A.J.A. ____."

provided for in Article XX. The amount of the royalty to be paid was calculated by the negotiators to be an amount equal to what the signatory operator would have paid if the operator had produced the coal at its own mines. J.A. 31.

The Trustees brought suit against Kaiser for failure to pay into the Funds the required royalty for coal purchased from employers for which no royalty contribution had been paid.

The United States Court of Appeals for the District of Columbia Circuit affirmed the District Court's granting of the Trustees' Motion for Summary Judgment. Kaiser's principal defense was that Article XX(d)(v), commonly referred to as the "coal-purchasing clause," was illegal under the federal antitrust laws[4] and Section 8(e) of the National Labor Relations Act, as amended (hereinafter "Section 8(e)").[5] The Circuit Court affirmed the District Court's holding that Kaiser "was not entitled to interpose the illegality defense." *Mullins v. Kaiser Steel Corp.*, 642 F.2d 1302, 1308 (D.C. Cir. 1980).

History of the Dispute

It is not contested that many signatory operators sought to avoid the terms of the collective bargaining agreements they negotiated with UMWA by the practice of subcontracting their coal lands and coal mines to nonsignatory operators with the agreement that the signatory operators had the right to purchase the coal. If UMWA would permit, a signatory operator could avoid its collective bargaining obligations by shutting down its mines, limiting production, and subcontracting its mining facilities or coal lands to nonsignatory operators and supplying its customers with coal purchased from these nonsignatories. The signatory operators could also accomplish the same result by purchasing coal from operators who were not subcontractors. The concern of the UMWA with this practice has been reflected in its collective bargaining agreements for over forty years. *See Dixie Mining Co.*, 165 N.L.R.B. 467, 471

[4] Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2 (1976).

[5] Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §158(e)(1978).

(1967). All of the clauses inserted in agreements prior to 1958 failed to accomplish their objective, so in 1958 the UMWA negotiated into its National Agreement a provision entitled the "Protective Wage Clause" (hereinafter "PWC"). PWC provided, in essence, that the signatory operators agreed that all bituminous coal mined, produced, or prepared by them or acquired by them under a subcontracting arrangement shall be mined or produced under terms and conditions which are as favorable to the employees as those provided in the UMWA National Agreement.

PWC's effectiveness was destroyed in 1963 when the NLRB found that the clause violated Section 8(e). *Raymond O. Lewis*, 144 N.L.R.B. 228 (1963). Shortly thereafter, UMWA's National Agreement was amended (1964) to replace the PWC with a purchase-of-coal clause, which required a signatory operator to pay 80-cents into the UMWA Welfare and Retirement Fund on all coal purchased from nonsignatory operators, as compared with the royalty of 40-cents a ton on coal produced by the signatory operator.[6] This clause has been referred to as the "80-cent clause."

The "80-cent clause" was not included in the agreements covering the captive mines of the steel companies. The Board found the "80-cent clause" violative of Section 8(e) in a supplemental compliance determination in *Raymond O. Lewis*, 148 N.L.R.B. 249 (1964), and in an independent decision and order in a subsequent case, *Dixie Mining Co.*, 165 N.L.R.B. 467 (1967) (hereinafter the "80-cent cases"). Both the PWC and the 80-cent cases were brought before the Circuit Court of Appeals and both were remanded to the Board for further proceedings. *Lewis* v. *NLRB*, 350 F.2d 801 (D.C. Cir. 1965);

[6] Kaiser wrongfully characterizes the purchase-of-coal clause in the 1974 Agreement as a penalty clause which gives a signatory operator an advantage over nonsignatory operators who sell coal (Brief at 4 n.5), because the amount of royalty paid by a signatory operator who produces the coal is *equal to the amount of royalty paid on coal purchased. Prior* to the 1974 Agreement, the royalty on purchased coal was *double* the royalty on coal produced by signatory operators; hence, it was characterized as a penalty clause.

International Union, UMWA v. *NLRB*, 399 F.2d 977 (D.C. Cir. 1968).

After remand and further proceedings, the Board found that the PWC and the 80-cent clause had a lawful objective of preserving unit work and standards and did not contravene Section 8(e). The Board concluded that the "80-cent clause functions as a union standards clause in protecting and preserving the work of employees working under the UMWA agreement and the standards under which such work is performed by removing the economic incentive to subcontract such work stemming from the lower wage and fringe benefit costs of nonsignatory mines." *Dixie Mining Co.*, 188 N.L.R.B. 753, 754 (1971) (hereinafter "Dixie Mining (1971)"). Seven steel companies had sought to file exceptions to the Hearing Examiner's decision, but the Board denied the request because they were not parties to the proceedings. The Board determined that the steel companies' brief was in the nature of an amicus curiae brief and considered it on that basis. *Dixie Mining (1971), supra* at 753 n.3. The steel companies' brief asserted the 80-cent clause contravened Section 8(e).

When the *80-cent* case was again brought before the Circuit Court by the UMWA, the Circuit Court, acting on a motion of Dixie Mining Company, one of the independent operators that had challenged the clause, found that it did not have jurisdiction, since no aggrieved party had yet appealed from the Board's second decision, because the Circuit Court's "unqualified remand in this case operated to divest us of jurisdiction." Thus, UMWA's petition to review was denied.[7]

[7] The *PWC* and *80-cent* cases were consolidated for appeal. The Circuit Court held that the *PWC* case was moot because the Joint Industry Contract Committee, charged with the administration of the PWC, suspended operation of the PWC on November 4, 1959, one week before the effective date of Section 8(e), and had not enforced it since. Thus, the Circuit Court stated, "We therefore think the issue of the PWC's validity lacks the immediacy of a live controversy calling for judicial resolution." *Int'l Union, UMWA* v. *NLRB*, 468 F.2d 1139, 1141 (D.C. Cir. 1972) and *sub nom. U.S. Steel Corp.* v. *NLRB*, No. 73-1700 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 983 (1974).

Although the contracts of the steel companies did not contain the coal-purchasing clause in the 1964 and 1966 contracts, they agreed in 1968 that, if during the life of the agreement, all questions concerning the lawfulness of the 80-cent clause shall have been resolved in favor of such clause by the court of last resort, the captive operators "shall engage in good faith negotiations with you concerning what action may be appropriate between it and UMWA under the then existing circumstances." C.A.J.A. 473. Following the Board's decision in January 1971, all of the captive operators, including Kaiser, agreed to include the purchase-of-coal clause in the 1971 Agreement and it has been included in each succeeding agreement.[8]

Subsequently, when the Trustees discovered that U.S. Steel Corporation had failed to pay royalty due under the terms of the 1974 Agreement on purchased coal and failed to report such purchases to the Funds, U.S. Steel filed a suit against UMWA and the Trustees, making the same antitrust and Section 8(e) allegations as Kaiser does herein. The Trustees filed a counterclaim seeking payment of royalties due. *United States Steel Corp.* v. *International Union, UMWA*, Civil No. 75-1966 (D.D.C. 1977). In *U.S. Steel*, the District Court found that the purchase-of-coal clause did not violate the antitrust laws and also dismissed the complaint with prejudice because the parties agreed "that the remaining portion of plaintiff's complaint, which challenges the 'purchase-of-coal' clause as violating Section 8(e) of the National Labor Relations Act, 29 U.S.C. §158(e), should be dismissed with prejudice," and that the Trustees' counterclaim was dismissed with prejudice, conditioned upon payment by U.S. Steel to the Trustees of "all royalties due under the purchase-of-coal clause of the 1974 Agreement." *Kaiser, supra* at 1312. A copy of the District Court's Order and the Memorandum of Agreement are attached hereto as Appendix A.

[8] The royalty on produced coal was increased in the 1971 Agreement. Likewise, the amount of royalty on purchased coal was also increased. While the UMWA prevailed in *Dixie Mining (1971), supra*, it attempted to get the "court of last resort" to also sanction the clause. *See* p. 6 and n.7, *supra*.

Subsequent thereto, as the Circuit Court pointed out in the instant case, "another employer signatory to the 1974 Agreement has previously charged that the purchase-of-coal clause violates Section 8(e), but the Board's General Counsel refused to issue a complaint. *International Union, UMWA (Consolidation Coal Co.)*, NLRB Case No. 6-CE-17 (March 28, 1979). The implication of this action is that the General Counsel did not regard the claim as 'sufficiently meritorious to warrant Board consideration.' *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 139 (1975)." *Kaiser Steel supra* at 1308 n.5.

The purchase-of-coal clause has never been found to violate the antitrust laws, although it has been held that, even if legal, it can be used as evidence, along with other facts, to assert that UMWA and other large coal operators conspired to put small operators out of business, in violation of the antitrust laws. *South-East Coal Co.* v. *Consolidation Coal Co.*, 434 F.2d 767 (6th Cir. 1970).[9]

SUMMARY OF ARGUMENT

The issues before the Court are (1) whether a delinquent employer, Kaiser, who breached its voluntarily assumed obligations to pay health and retirement contributions to benefit plans on behalf of its employees, and who refuses to invoke its available NLRB remedies against the union, can require third party, neutral trustees to litigate the same labor law issues in a delinquency enforcement action; and (2) whether, in the same type of action, the employer may raise antitrust defenses more appropriately directed to the union. The courts below answered both questions in the negative. The UMWA respectfully asserts that those decisions were correct.

---

[9] The purchase-of-coal clause was not considered in *UMWA* v. *Pennington*, 381 U.S. 657 (1965), nor in *Tennessee Consolidated Coal Co.* v. *UMWA*, 416 F.2d 1192 (6th Cir. 1969), *cert. denied*, 397 U.S. 964 (1970), as asserted in Kaiser's Brief at 5 n.8.

I. Public policy, as previously expressed by this Court and recently affirmed by Congress in enacting the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §1001a (1981 Supp.), requires that employee benefit plan trustee delinquency collection actions not be complicated by extraneous labor law issues. This is particularly so when the contemplated labor law remedies against the proper party, the union, could have been, but were not invoked by the employer. By reversing the decision below, thereby granting jurisdiction to federal courts to consider, in the first instance, unfair labor practice questions in delinquency-collection actions, the Court may well force such trustee contract actions back into state courts, thwarting congressional intent to encourage a national pension policy. Furthermore, state courts have been denied jurisdiction over federal unfair labor practices, unless the *Board* cedes jurisdiction to them, an authority never exercised. 29 U.S.C. §164(c).

II. Even if Kaiser is permitted to raise a defense in federal or state court under Section 8(e), Kaiser has not sufficiently alleged facts on the issue to withstand a summary decision. The challenged provision, which is legal on its face, has not been shown to have been applied improperly herein.

III. Assuming *arguendo* a possible antitrust violation, such a defense is not applicable against neutral, third party trustees, in a contract enforcement action, nor is it applicable to "intelligible economic transactions," which the purchase-of-coal clause is, particularly when the defense would deny already-earned compensation to employees. As with the Section 8(e) defense, permitting the defense of illegality under the antitrust laws in trustee delinquency enforcement actions, which can also be brought in state courts, will unnecessarily raise the issue of whether or not a federal antitrust defense can be raised in a similar collection action before a state court.

Since the challenged provision deals with "wages, hours and other conditions of employment," absent a conspiracy by Kaiser and the BCOA with the UMWA, the purchase-of-coal clause is protected by the labor exemption to the antitrust acts. Kaiser has not sufficiently alleged facts regarding the

1974 Agreement negotiations that were conducted by newly-installed UMWA officers to withstand summary disposal of its conspiracy defense.

Since Kaiser can pursue its antitrust and labor actions against the proper party, the union, it should not be permitted to unnecessarily complicate what should be a simple delinquency-collection action by neutral, third party trustees. Reversal of the decision below will encourage litigation and delay collections, thereby adding further complexities, both short and long range, to the financial planning for employee benefit trusts. As this nation increasingly relies on its private pension system to protect its retired workers, such a result should not be sanctioned.

ARGUMENT

I. IN A CONTRACT ENFORCEMENT ACTION BY HEALTH AND RETIREMENT PLAN TRUSTEES, STATE COURTS AND FEDERAL COURTS, IN THE FIRST INSTANCE, DO NOT HAVE JURISDICTION TO DETERMINE WHETHER CONTRACTUAL PROVISIONS ARE UNFAIR LABOR PRACTICES

This Court has long recognized that interpreting and applying the National Labor Relations Act "is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review . . . ." by the federal courts. *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). Indeed, in applying the often "elusive" concept of secondary activity, *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 386-88 (1969), "courts should defer to the NLRB's understanding of the statute which it administers." *NLRB* v. *Pipefitters*, 429 U.S. 507, 528 (1977); *see Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 303-04 (1977). "Accordingly, regardless of how (the Court) might have resolved the question as an initial matter, the appropriate weight . . . must be given to the judgment of the agency whose special duty (it) is to apply this broad statutory language to varying fact patterns . . .." *Bayside, supra* at 304.

This general rule of deferral to the Board makes it inappropriate to raise unfair labor practices as a defense to contract enforcement actions *by trustees* before federal or state courts. First, public policy dictates that neutral, third party health and retirement fund trustees should not be thrust into litigating difficult, often contentious, and complicated labor matters, when appropriate remedies exist against the proper party — the union.[10] Secondly, Congress, which has carefully crafted the remedies that are available against unions for secondary activities and hot cargo provisions, clearly limited federal courts, regarding enforcement of alleged Section 8(e) provisions, to injunctive relief initiated by the Board and review of Board orders. The Board should have the initial opportunity to apply the often "elusive" concepts of secondary activity to the broad range of fact patterns that can arise. Finally, after long debate, Congress refused to grant state courts jurisdiction over unfair labor practices, unless the NLRB specifically ceded such to them.[11] Yet, reversal of the opinion below could lead to that result, since trustee actions are often brought in state courts.

A. Congress And This Court Recognize, While Section 8(e) And Antitrust Actions Or Defenses May Be Raised Against The Union In The Proper Forums, That Overriding Public Policy Concerns Do Not Support Such Defenses In Trustee Enforcement Actions

Federal employee benefit and labor policies require that Kaiser raise its legal objection to the purchased-coal provision

[10] It should be noted that the really complex and controversial factual issues that would be necessary to resolve, if this case is remanded, particularly the contested factual issues, have not been litigated in this case. Compare, for example, Roger Haynes' and Donald Pierce's affidavits. Trustees should not be placed in the middle of such a dispute, nor should they be expected to argue what will normally be the union's position in such an action. 96 CONG. REC. H7899 (daily ed. Aug. 26, 1980) (remarks of Rep. Thompson). Nor are these questions appropriate for initial consideration by a court. They are properly raised before the Board. *NLRB* v. *Int'l Longshoremen's Ass'n*, 447 U.S. 490, 511 (1980).

[11] See, n. 25, *infra*.

against the proper party, the UMWA, rather than interject the Funds' Trustees into the often contentious and tortous litigation history of this provision and its predecessors. *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960); *Pennington* v. *UMWA*, 325 F.2d 804, 818 (6th Cir. 1963) *reversed in part* 381 U.S. 659 (1965), *cert. denied in relevant part sub nom. Pennington* v. *Lewis*, 381 U.S. 949 (1965). In reaffirming this policy, Congress, aware of the nation's increasing reliance on the private pension system, recently took note of the particular situation facing this Court:

> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. *Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions.* This should *not* be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and *without regard to issues which might arise under labor-management relations law* — other than 29 U.S.C. 186. Sound national pension policy demands that employers who enter into agreements providing for pension contributions *not be permitted to repudiate their pension promises.*
>
> In this regard we endorse judicial decisions such as *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962); and *Huge* v. *Long Hauling Company, Inc.*, 590 F.2d 457 (3d Cir. 1978).

Remarks of Rep. Thompson, Chairman of the Task Force on Welfare and Pension Plans and the House Subcommittee on Labor-Management Relations, *supra* (emphasis added).

This Court previously adopted the same policy in *Benedict Coal, supra.* In a collection action by the UMWA Fund Trustees, the Court refused to permit the employer to raise as a defense the alleged breach of the contract by striking miners. In so doing, the Court took note that the bargaining history did not "explicitly" protect Benedict Coal from claims by the Trustees, *id.* at 469; that, in view of the industry-wide nature

of the Funds, Benedict Coal's failure to pay would "fall in the first instance upon the employees and their families across the country," *id.*; and since royalty payments "are really another form of compensation to the employees," allowing Benedict Coal to default on its contribution requirement would violate Section 301(b) of the Taft-Hartley Act, which prevents collection of money judgments against individual union members. *Id.* at 469-70.

Similar to *Benedict Coal*, nothing in the legislative history of Section 8(e) "explicitly" provides that Congress meant to protect Kaiser[12] against claims *by the Trustees*. On the contrary, Congress last year indicated just the opposite. Remarks of Rep. Thompson, *supra*. Kaiser's failure to pay these royalties had an impact on over 70,000 retirees and their families across the country, when the UMWA 1950 Pension Plan ran out of assets and had to temporarily suspend pension payments for several months during the 1977-78 contract strike. 96 CONG. REC. S10,105 (daily ed. July 26, 1980) (remarks of Sen. Randolph).[13] Finally, Kaiser's failure to pay not only effectively decreased the employees' compensation, its failure to pay acts as a nonenforcement remedy and, thereby, effectively collects damages for the allegedly secondary activity from the individual employees and retirees, rather than from the union. *See Complete Auto Transit, Inc.* v. *Reis*, ___ U.S. ___, 49 U.S.L.W. 4473 (1981). When other remedies exist against the proper party, the union, this Court, as it did in *Benedict Coal*, should defer to the public policy of "simplifying delinquency collection" actions and not thrust plan trustees into the

[12] Kaiser mischaracterizes itself as the "neutral" employer in this matter. Kaiser, as a signatory to three separate agreements containing the challenged clause, is the primary, not the secondary employer, since the intent of the clause is to discourage Kaiser from deteriorating the work unit. *Dixie Mining (1971), supra.*

[13] Kaiser's statement (Brief at 4 n.4), that the 1978 and 1981 Agreements contain a guarantee of the benefits provision has no relevancy. The contract at issue, the 1974 Agreement, had no such guarantees. Even if it had, Kaiser's delinquency makes it more likely that benefits could not be increased or expanded.

thicket of Section 8(e) and antitrust litigations. Remarks of Rep. Thompson, *supra*.

B. The Purchase-Of-Coal Provision Requiring Retirement And Benefit Contributions Should Be Presumed Legal And Enforceable, Since The Proper Agency Has Not Rendered The Provision Void

When Congress created a new unfair labor practice in 1959 with the passage of Section 8(e) of the Labor-Management Reporting and Disclosure Act, it made no exception to the prevailing rule that, in the first instance, unfair labor practices must be litigated before the National Labor Relations Board. While recognizing that, in appropriate instances, contract provisions alleged to be unfair labor practices under this section could be temporarily enjoined by federal courts from enforcement, Congress left the initiation of that remedy solely to the NLRB. 29 U.S.C. §160(l) (1978). Had Congress intended to sanction the type of self-help engaged in by Kaiser, there would have been little need to have included Section 8(e) as one of the few unfair labor practices for which the Board *must* seek temporary relief under Section 10(l), pending administrative action.

By upholding the Court of Appeals herein, Kaiser is not divested of the remedies that Congress did provide — it simply must pursue those remedies in the proper forum, the NLRB. With that in mind, there is no reason for this Court to judicially sanction the new private right of invalidation sought by Kaiser, *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743, 755-56 (1947), or to effectively grant the status of a private attorney general on Kaiser. *Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959).

Indeed, this case is not unlike an earlier royalty enforcement action by the UMWA Fund Trustees in the consolidated case of *Pennington* v. *UMWA*, *supra*. Therein, the employer not only raised the Sherman Act as a defense, but it claimed that the collective bargaining agreement was void in its entirety, based on alleged unfair labor practices. The Sixth Circuit, while finding that the UMWA had violated the Sher-

man Act (a finding later reversed),[14] relied in part on *Kelly* and enforced the Trustees' claim for uncollected royalties. The Court emphasized that an antitrust defense, even if the Trustees had themselves engaged in the conspiracy, did not bar the Trustees' collection action. 325 F.2d at 818.

The employer in *Pennington* also attempted to avoid its contractual obligation to contribute by claiming that the contract was void, since the UMWA allegedly unlawfully coerced the employer into signing the Agreement in violation of Section 8(b) of the NLRA. The Sixth Circuit, however, as should this Court, indicated that, absent a finding of such by the NLRB, the courts had no jurisdiction to entertain such a defense. 325 F.2d at 818, 819. *See Bruce's Juices, supra.*

The Sixth Circuit also indicated that, with respect to rights already accrued under the Agreement, as herein, that the *Trustees'* were not barred from collecting, citing *Kelly, supra,* and *Benedict Coal, supra.* Prior to hearing the antitrust issue in the consolidated case of *UMWA* v. *Pennington, supra,* this Court denied the employer's petition for certiorari on the royalty-collection issue, thus permitting enforcement of the Trustees' collection action. *Pennington* v. *Lewis, supra.*

As in *Pennington* v. *Lewis* and *Bruce's Juices,* this Court is not being asked to enforce a contract that has been found void by the proper forum.[15] Contracts are presumed to be legal, *Walsh* v. *Schlect,* 429 U.S. 401 (1977), unless they have been

[14] *UMWA* v. *Pennington,* 381 U.S. 657 (1965).

[15] The UMWA further contends that, Section 8(e) need not be read as voiding the *Trustees'* right to collect. *Benedict Coal, supra; Kelly, supra; Pennington* v. *UMWA, supra* at 818. Indeed, this Court, particularly in interpreting labor laws and Section 8(e), *National Woodwork Mfrs.* v. *NLRB,* 386 U.S. 612, 619 (1967), has advised that it is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." *Connell, infra* at 628. In balancing the concerns expressed in Section 8(e) against the concern that (1) the defenses against the union not be applicable to action by

found illegal by the proper forum — the NLRB. The provision challenged herein must, therefore, be presumed legal on its face,[16] until the agency of competent jurisdiction, the NLRB, determines that the clause is void. Section 10(l) insures that premature enforcement of the provision may be prevented, if the NLRB has a "reasonable cause to believe" that the provision violates Section 8(e). Kaiser, however, chose not to file an unfair labor practice charge or seek injunctive relief from the NLRB, challenging the provision in the 1974, 1978, or now the 1981 Agreement which became effective on June 7, 1981.[17]

---

trustees, *Benedict Coal, supra*, and (2) that the financial integrity of multiemployer pension plans should be encouraged, 29 U.S.C. §1001a (1981 Supp.); *NLRB* v. *Amax Coal Co.*, ___ U.S. ___, 49 U.S.L.W. 4880 (1981), this Court should uphold the decision below — particularly where the collective bargaining contract is completed and the substandard produced coal has already been purchased. *Pennington* v. *UMWA, supra* at 819.

However, the Court, in order to uphold the decision below, need not determine, as it did in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 386-87 (1970); *accord Occidental Life Insurance Co.* v. *Pat Ryan & Assoc., Inc.*, 496 F.2d 1255, 1265-66 (4th Cir. 1974) *cert. denied*, 419 U.S. 1023 (1974), that (as to the Trustees) the term "void" in the statute was not absolute. As in *Bruce's Juices, supra* at 745-46, the Court need only presume legality and decline to entertain the illegality defense, because the appropriate tribunal — there the Federal Trade Commission, here the NLRB — has not had its jurisdiction invoked and, therefore, has not "voided" the challenged provision.

[16] *See Dixie Mining (1971), supra*, which upheld an earlier purchased-coal provision requiring double royalties on purchased coal.

[17] Without conceding the point, the UMWA suggests that such a charge by Kaiser might not be dismissed, if, as it claims, the provision is being applied illegally to Kaiser, a factual situation that may not have existed in *Consolidation Coal Co.*, NLRB Case No. 6-CE-17, *supra*. Even if the NLRB refuses to issue a complaint, Kaiser's position is not unlike a discharged employee who may believe that he or she has a meritorious unfair labor practice case, but the NLRB's General Counsel refuses to issue a complaint. *cf. Bruce's Juices, supra at 746.*

Having chosen not to invoke the proper forum, Kaiser now urges this Court to unnecessarily create another exception to the preemption doctrine. While the UMWA concedes that there are some exceptions to that doctrine, they are either created by statute, *e.g.*, 29 U.S.C. § 164(b) (1978), or ... e exceptions touch areas primarily of local interest. Neither rationale justifies the exception for which Kaiser now argues. In particular, the existence of Section 10(l) argues strongly against creation of another exception.[18]

Kaiser is not content to carve out just another exception to the primary jurisdiction rules. Its reading of *Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616 (1975), would have the general rule of primary NLRB jurisdiction swallowed by its exception. This Court did not blanketedly hold, as suggested by Kaiser, that courts always had jurisdiction to determine whether a clause violated Section 8(e).[19] With little elaboration, the Court only indicated that "*federal* courts *may* decide labor law questions that emerge as collateral issues in suits brought under independent *federal* remedies, including the antitrust laws." *Connell* at 627 (emphasis added).[20]

In *Connell*, the primary issue relevant to this action involved statutory construction, not factual findings — do the words "an employer in the construction industry" mean any employer or just employers within the context of a collective bargaining relationship with the union. There was little need, unlike here, to engage in extensive and complicated factual

[18] In the event that a Section 10(l) order is not granted by a court, but the Board subsequently invalidates the provision, Kaiser's rights should still not be prejudiced 29 U.S.C. §1103(c)(2)(A)(ii) (1981 Supp.).

[19] Of course, after the NLRB has had an opportunity to consider the issue, federal courts may exercise limited review of the Board action.

[20] *Connell* apparently does not grant such jurisdiction on unfair labor practice issues to *state* courts. However, state courts frequently hear pension contribution enforcement actions.

findings, involving unit determinations, the negotiators' intentions, and the primary, secondary, or incidental effects of the provision — matters best left, in the first instance, to the Board. *International Longshoremen's Association, supra.* Thus, *Connell,* in permitting the court to statutorily construe Section 8(e) itself, only lightly stepped over the doctrine of primacy.

To further understand *Connell,* one must also look to the cases cited. *Id.* at 626 n.3. The UMWA asserts that the three tests set forth by the Court in *Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676, 684-88 (1965), the primary case relied on by the *Connell* court, are the most appropriate for application here. Furthermore, we suggest that all three tests must be met before the Court should exercise its jurisdiction.[21]

In *Connell,* as well as *Jewel Tea,* this Court recognized that the nature of the action was important to resolution of the jurisdiction issue. In those cases, a party to the contract, the union, in defending itself against an antitrust action, was contending that the challenged contractual provision was either legal, or that the issue of legality should, in the first instance, be left to the Board. Unlike here, the Court recognized, though, that it would be rare for a *union* to challenge before the NLRB the validity of a clause that the union was also seeking to enforce. In *Connell,* one could not expect the Plumbers Union to have filed a Section 8(e) charge to test the validty of the contract. Similarly, in *Jewel Tea,* there was not a realistic expectation of an available procedure for obtaining Board

[21] The Court, while primarily relying on *Jewel Tea,* also cited *Vaca* v. *Sipes,* 386 U.S. 171 (1967) and *Smith* v. *Evening News Ass'n,* 371 U.S. 195 (1962) for comparison. Neither of those two cases resolve the issue here. *Vaca,* in refusing to defer unfair representation issues to the Board, pointedly noted that this court-developed doctrine was only belatedly adopted by the Board. *Smith* only stands for the proposition that activities which constitute contract breaches, as well as unfair labor practices, are cognizable by the courts under § 301 of the Labor Management Relations of 1947, 29 U.S.C. § 185 (1978). Here, it is not a contract breach, but the contract itself, that is alleged to be the unfair labor practice.

determination.[22] *Id.* at 648. Unlike the defendants in *Connell* and *Jewel Tea*, however, the defendant in Kaiser could realistically have been expected to exercise its administrative remedies before the Board, including injunctive relief.[23] It chose not to do so.[24]

In *Jewel Tea*, the Court also took note that the antitrust action, when first initiated by the employer, only clearly alleged a conspiracy between the union and one set of bargaining units to impose certain terms on the rest of the units. It was only later that it became evident, in addition to the conspiracy theory, resolution of another major issue would be necessary — whether the marketing-hours issue was "a condition of employment," so as to invoke the labor exemption. Thus, deferral to the Board may have unnecessarily protracted the litigation. From the outset here, there was never any doubt — Kaiser, from the time it entered into the contract, considered the provision as violative of Section 8(e). Thus, Kaiser fails to meet two of the *Jewel Tea* tests. And as we will show, Kaiser could not always meet the third test.

[22] In *Jewel Tea*, there could not have been a Board determination, since an unfair labor practice charging a refusal to bargain would have been necessary to invoke the Board's jurisdiction. There was no refusal to bargain, since the challenged agreement resulted from bargaining, rather than the refusal to bargain.

[23] While the Court showed some concern with the six-month time limit in *Jewel Tea*, we suggest that it was unlikely, since a contract was reached, that there would have been a reaffirmation of a refusal to bargain, thus extending the Section 10(b) time limits. However, such reaffirmation is much more likely with a Section 8(e) unfair labor practice. As was pointed out earlier, at no time, has Kaiser filed 8(e) charges seeking invalidation of the challenged provision in the 1974, 1978, or 1981 Agreements.

[24] In refusing to entertain a federal antitrust defense to a contract enforcement action, one court has noted that, as Kaiser, the aggrieved party did not avail itself of injunctive relief pursuant to 15 U.S.C. § 26 (1978). *Union Oil Co.* v. *Chandler*, 4 Cal.App.3d 716, 728, 84 Cal. Rptr. 756, 764 (1970).

C. Permitting Employers To Raise A Section 8(e) Defense In Trustee Enforcement Actions Might Impermissibly Extend Jurisdiction Over Federal Unfair Labor Practices To State Courts

Unlike *Connell* and *Jewel Tea*, which were federal antitrust actions, which can only be brought in federal courts, 15 U.S.C. § 4, this is a contract enforcement action that could have also been brought in a state court. Thus, while federal courts may have experience in interpreting federal labor statutes, the remaining test in *Jewel Tea*, *supra* at 647, the same cannot be said for state courts, which have no jurisdiction to decide unfair labor practice issues, *Associated General Contractors* v. *Otter Tail Power Co.*, 611 F.2d 684, 693 (8th Cir. 1979), unless the NLRB specifically cedes jurisdiction to them, 29 U.S.C. §164(c)(2). It is, however, prevented from doing that here. 29 U.S.C. §164(c)(1).[25]

Should this Court rule in Kaiser's favor, it will face in this or a subsequent case the same issues in the context of a state court action. To permit interpretation of Section 8(e) by state courts will thwart congressional intent. To prohibit such defenses in state courts, but permit them in federal courts, goes against the congressional policy to encourage simplified federal collection actions. Remarks of Rep. Thompson, *supra*. By upholding the Court of Appeals, the Court will avoid this anomaly.

---

[25] The Landrum-Griffin Conference Committee, after extended debate in the Congress, specifically rejected the Senate provision which permitted state courts to exercise jurisdiction over *all* Board cases. The Committee, while permitting the Board to cede jurisdiction in certain circumstances, prohibited the Board from ceding jurisdiction on those matters over which it had already exerted jurisdiction, such as the matters herein. *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* at 940-41.

II. KAISER HAS NOT ALLEGED FACTS SUFFICIENT TO REBUT THE PRESUMED LEGALITY OF THE PURCHASE-OF-COAL PROVISION

The NLRB has already determined in a Section 8(e) proceeding that the more restrictive predecessor to the purchased-coal provision, the 80-cent clause, was legal on its face. *Dixie Mining (1971), supra.* In order for Kaiser to prevail on a summary motion, it must allege facts that clearly show that the provision is illegal in its application generally. *Id.* at 754. Kaiser has failed to do this.[26]

In determining whether an otherwise lawful union standards provision has been unlawfully applied, the NLRB compares the *total* labor *costs* of subcontractors with the *total* labor *costs* of the primary unit. Indeed, comparison of specific *benefits*, rather than costs, may render the provision unlawful. *Associated General Contractors & Teamsters*, 227 N.L.R.B. 269-73 (1976). The purchased-coal clause is intended to approximately equalize the differences in the total costs of wage and fringe benefits between signatory and nonsignatory employers, a lawful objective. *Dixie Mining (1971), supra.* However, Kaiser's affidavits only compare the *level* of employee *benefits* between Kaiser and Mid-Continent. C.A.J.A. ¶ 12 332. This distinction between costs and benefits is particularly important when comparing employers with single employer plans to those with multiemployer plans, in which there are a greater percentage of participants vesting, thus greatly increasing the costs to the plan for similar benefit levels.

Indeed, one government study has shown that costs were 90-cents per employee-working-hour for coal miners under the UMWA multiemployer plan, while costs for similar benefits under non-UMWA (primarily single employer) plans were only 4-cents per employee-working-hour.[27] Thus, the eco-

[26] See also n. 31, *infra.*

[27] "Employee Compensation and Payroll Hours, Bituminous Coal Mining 1969," Report 399, Bureau of Labor Statistics, U.S. Department of Labor, (C.A.J.A. 594-99); Bethel Affidavit, ¶ 29 (C.A.J.A. 573). Kaiser apparently concedes that UMWA-produced coal does cost more. Brief at 4 n.5.

nomic incentive to purchase coal, rather than produce it within the unit, still remains, even if single employer benefit levels are the same as those under the UMWA Agreement. The purchased-coal clause lawfully removes that incentive.[28] It is an effective, efficient, and administratively manageable[29] work preservation provision, which lawfully makes a "direct frontal attack upon a problem thought to threaten the maintenance of the basic wage (and benefit) structure established by the collective bargaining contract." *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 212 (1964).[30]

[28] The 80-cent clause was shown to have a work-preservation intent and effect. *Dixie Mining*, (1971); *Riverton Coal Co.* v. *UMWA*, 79 L.R.R.M. 2348, 2352, ¶ 47 2360 (S.D. Ohio 1970), *rev'd*, 453 F.2d 1035 (6th Cir. 1972), *cert. denied*, 407 U.S. 915 (1972). The rationale of the Sixth Circuit, in reversing the district court, should now be seriously questioned. The Sixth Circuit, while relying on other evidence in the record, criticized the 80-cent clause as not being work-preservative, since Riverton Coal Co. could close all of its mines and purchase the coal elsewhere without violating the provision — an action now sanctioned by this Court. *First National Maintenance Corp.* v. *NLRB*, ___ U.S. ___, 49 U.S.L.W. 4769(1981). *But that can happen under any lawful union standards provision.*

[29] It is very difficult administratively for the UMWA or the Trustees to monitor even this provision, since accurate information is not always readily available on coal purchases. They must rely on good faith reporting by the employers. And, in view of the fungible nature of the product, neither the UMWA nor the Trustees have the practical means to determine the characteristics of the coal. *UMWA (BCOA)*, 179 N.L.R.B. 479, 480 (1969). Indeed, steam coals used by utilities and metallurgical coals used by steel companies are often blends of various grades of coal. C.A.J.A. 643-46.

[30] In determining whether the purchased-coal provision is lawful under Section 8(e), the Board must examine "all the surrounding circumstances," including the economic characteristics of the industry. *National Woodwork, supra* at 644 n.38. Application of this test, particularly in light of *Dixie Mining (1971), supra*, and the elimination of the double royalty provision, should result in this provision being found lawful. The threat of displacement or the loss of job opportunities for UMWA coal miners from the purchase of coal from sub-

Kaiser has not alleged facts to show that the royalty overcompensates for *costs* to support its argument that the purchased-coal provision is unlawful. This further supports the ruling below.

---

standard mines, from "paper" corporate transfers and runaway operators, and from lessor-lessee transactions by a signatory to a nonsignatory employer (while still retaining substantial control over the mining of coal), is more than just remote.

Indeed, the federal government has long recognized the vicissitudes of the coal industry. In 1943, the National War Labor Board, for instance, directed that each UMWA agreement contain a provision prohibiting leasing for the purpose of subterfuge. *Riverton Coal Co.* v. *UMWA, supra* at 2352. In passing the Black Lung acts of 1977, Pub. L. No. 95-239 and Pub. L. No. 95-227, Congress frequently expressed its concern with coal operators who avoided their black lung responsibilities through various corporate transactions. *See, e.g. Black Lung Reform Act and Black Lung Benefits Revenue Act of 1977,* Committee on Education and Labor, House of Representatives, Committee Print, Leg. His., 96 Cong. (Feb. 1979) at 348, 349; 20 C.F.R. §725.491(b)(2), which makes lessors responsible for payment, in appropriate circumstances, for black lung benefits due to employees of lessees (see the Secretary's justification for this rule at 43 Fed. Reg. 36,803 (August 18, 1978).

Congress recently expressed its concern that various corporate transactions in the coal industry could financially harm the UMWA's pension funds. *See, e.g.*, 96 CONG. REC. S10,105 (daily ed. July 29, 1980) (remarks of Sen. Randolph). The strongest withdrawal liability provisions in the entire Act were directed at the coal industry. *Id.*, 29 U.S.C. §§1391(d)(2) and 1396 (1981 Supp.). Indeed, the BCOA recognized that differentials in pension liabilities "would clearly be an incentive for employers already in a plan to seek ways . . ." such as purchasing substandard-produced, less-costly coal ". . . to gain the preferential treatment." Hearings on H.R. 3904, the Multiemployer Pension Plan Amendments Act of 1979, before the Task Force on Welfare and Pension Plans, Committee on Education and Labor, House of Representatives, 96 Cong., 1st Sess. (June 5 and 7, 1979) at 1574-75.

III. A FEDERAL ANTITRUST DEFENSE MAY NOT BE RAISED BY KAISER IN A HEALTH AND RETIREMENT TRUSTEES' ENFORCEMENT ACTION, WHETHER BROUGHT IN FEDERAL OR STATE COURT.

This Court has not looked favorably upon the defense of illegality in a contract enforcement action based on violation of the Sherman Antitrust Act. As here, this is particularly so when the contract has been fulfilled by the other party. *Kelly, supra; Bruce's Juices, supra.*[31]

Even if one is to accept Kaiser's reading of this Court's decision in *Kelly* — which the UMWA does not do — such interpretation would still not justify nonenforcement of the pur-

---

[31] There is no dispute that Kaiser's employees carried out their obligations under the collective bargaining contract. Kaiser argues that the Court's concern in *Kelly* at 520-21, about "preventing people from getting other people's property for nothing when they purport to be buying it . . ." is not applicable here, since the pension and health contributions are not deferred compensation. That argument has long ago been rejected. *Benedict Coal, supra; Inland Steel Co.* v. *NLRB*, 170 F.2d 247, 253 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949), *Davis* v. *Alabama Power Co.*, 383 F.Supp. 880, 890-91 (N.D. Ala. 1974) *citing Ball* v. *Victor Adding Machine Co.*, 236 F.2d 170, 173, 174 (5th Cir. 1956).

Kaiser concedes, as it must, that the issue of the Trustees' knowledge of whether Kaiser was or was not purchasing coal is immaterial J.A.C.A. 294 n.1. Kaiser's affidavits only allege that past UMWA officials, (including International President Tony Boyle, who negotiated the 1968 and 1971 Agreements and who was subsequently replaced, as were the Trustees, when Arnold Miller won the presidency in 1973) knew of Kaiser's purchases. Kaiser's affidavits do not indicate any knowledge by the newly-installed UMWA officers or by the Trustees of Kaiser's purchases during the term of the 1974 Agreement. Furthermore, Article XX, Section (d)(5) of the 1974 Agreement was also violated by Kaiser, when it refused to report its purchased coal, as it was required to do. Kaiser also failed to respond to the Trustees' questionnaire seeking information from all

chase-of-coal clause.[32] In applying Kaiser's rationale here, requiring payment of royalties on coal not produced by Kaiser is an "intelligible economic transaction" not in and of itself an unlawful agreement. *Walsh* v. *Schlect, supra.* Since health and retirement contributions are so "intimately related to wages, hours and working conditions," *Jewel Tea, supra* at 689, the purchased-coal provision, absent a conspiracy, is not challengeable in an antitrust action. *Id.; Bruce's Juices, supra* at 689-90.[33] Just as with the nondelivery agreement in *Kelly,* it is only the nonpayment of royalties by Kaiser on purchased coal to which royalties have already been paid that could even conceivably characterize the transaction as illegal.[34] Since Kaiser purchased little or no coal on which royalties had already been paid, enforcement of the Trustees' action here could "hardly be said to enforce a violation of the Act." *Kelly* at 521.

The Court has shown its reluctance to deny enforcement of a contract, even in the face of an antitrust defense, and even

---

the signatory employers regarding their purchase or nonpurchase of coal. Therefore, Kaiser is not in a good position to claim that the Trustees have sat on their rights until the expiration of the Agreement.

[32] The UMWA relies on the Trustees' interpretation of *Kelly.*

[33] Kaiser's affidavits do not "clearly" show as they must, Norris-LaGuardia Act, 29 U.S.C. §106 (1978), that the newly-elected UMWA agents engaged in a conspiracy with Kaiser, as a member of BCOA, in the *1974* negotiations to restrict the UMWA's freedom elsewhere. The NLRB, on remand from the Court of Appeals on the issue of "intent," found that the purchased coal provision was intended as a work-preservation tool. *Dixie Mining (1971), supra;* see n.36 *infra.* Thus, the antitrust defense, which Kaiser did not raise in its motion for summary judgment C.A.J.A. at 292 n.2, even if permitted, has not been sufficiently raised by Kaiser to withstand the Trustees' summary motion. *Berggren* v. *Sun Oil Co.,* 79 F.R.D. 87, 89-90 (E.D. Wis. 1978).

[34] If the royalty were *again* required for coal purchased on which the royalty had *already* been paid, one might argue that the provision violated Section 8(e), since it would "penalize" Kaiser for doing business with other UMWA-organized employers.

when the enforced contract allegedly lessens competition in violation of the Robinson-Patman Act. *Bruce's Juices, supra* at 758. (Murphy, J. dissenting). The UMWA asserts that the Court's policy of enforcing executed contracts, as expressed in *Kelly* and *Bruice's Juices*, despite the defense of illegality under the antitrust laws, is even more appropriate in an action by health and welfare trustees. *Cf. Benedict Coal, supra;* remarks of Rep. Thompson, *supra*. Otherwise, the Trustees, rather than the appropriate party, the UMWA, would be forced into litigating issues that would arise from an antitrust or Section 8(e) defense, that are more properly left to litigation by the UMWA.[35]

Finally, it should be pointed out that, unlike federal courts which have experience in interpreting the antitrust and federal labor laws, *Jewel Tea, supra* at 686, state courts certainly do not have such expertise.[36] Yet, actions on a contract to enforce pension contribution requirements have been fre-

[35] For instance, the determination of the appropriate unit for which work is being preserved, an often difficult factual and legal issue, particularly in multiemployer bargaining situations, *Dixie Mining, (1971), supra;* Note, *Secondary Boycotts and Work Preservation*, 57 Va. L. Rev. 1280, 1291-94 (1971), is best left to litigation by the union before the NLRB.

[36] Determination of issues arising under the federal antitrust laws are not within the jurisdiction of state courts, 15 U.S.C. § 4; *Freeman* v. *Bee Machine Co.*, 319 U.S. 448, 452 n.6 (1943); *General Investment Co.* v. *Lake Shore & Michigan Southern Railway Co.*, 260 U.S. 261, 287 (1922); *see Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 271 (1937); whether by way of attack or defense. *Miller* v. *Granados*, 529 F.2d 393, 395 (5th Cir. 1976); *Vaughn Co., Ltd.* v. *Saul*, 143 Ga. App. 74, 237 S.E. 2d 622 (1977); *Azalea Drive-In Theatre* v. *Sargoy*, 215 Va. 714, 214 S.E.2d 131, 135 (1975), *cert. denied* 423 U.S. 940 (1975); *Appalachian Power Co.* v. *Regional Properties, Inc.*, 364 F.Supp. 1273, 1278 n.11 (D.Va. 1973); *Union Oil Co.* v. *Chandler*, 4 Cal. App. 3d 716, 84 Cal.Rptr. 756, 764 (1970); *General Talking Pictures Corp.* v. *DeMarce*, 203 Minn. 28, 279 N.W. 750 (1938); *but see Lyons* v. *Westinghouse Electric Corp.*, 222 F.2d 184 (2d Cir. 1955).

quently brought in state courts. If Kaiser's position is accepted, this Court may subsequently have to extend the same jurisdiction to state courts for consistency purposes. Otherwise, trustees will be encouraged to bring all enforcement actions in state courts, a result contrary to congressional intent to encourage the development of a national private pension policy. This Court can and should avoid this result by affirming the decision below.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

HARRISON COMBS
WILLARD P. OWENS*
A. RANDALL VEHAR
900 - Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 842-7330
Counsel for International Union, United Mine Workers of America, Amicus Curiae

**Counsel of Record*

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1966

UNITED STATES STEEL CORPORATION,

Plaintiff.

v.

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL.,

Defendants.

ORDER
Filed October 5, 1977

JAMES F. DAVEY, Clerk

Upon consideration of the pleadings, the cross motions for summary judgment which have been filed by Plaintiff, by Defendant International Union, United Mine Workers of America ("UMWA"), and by Defendants Davis, Huge, and Dean ("Defendant Trustees"), the affidavits, the parties' "Stipulation of Issues, Undisputed Facts and Disputed Facts" and exhibits thereto, and the parties' memoranda and oral argument; it appearing to the Court that there are no material facts in dispute with respect to whether or not the so-called "purchase-of-coal" provision of Section (d) of Article XX of the National Bituminous Coal Wage Agreement of 1974 (the "1974 Agreement") violates Section 1 of the Sherman Act, 15 U.S.C. §1 or any other antitrust law; as stated by this Court at the hearing on May 26, 1977, it appearing further that judgment should be entered dismissing Plaintiff's complaint insofar as it challenges the "purchase-of-coal" provision of Section (d) of Article XX of the 1974 Agreement as violating the antitrust laws; it appearing further that the parties have agreed that the remaining portion of Plaintiff's complaint, which challenges the "purchase-of-coal clause" as violating Section 8(e) of the National Labor Relations Act, 29 U.S.C. §158(e),

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1966

UNITED STATES STEEL CORPORATION,

Plaintiff,

v.

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL.,

Defendants.

ORDER
Filed October 5, 1977

JAMES F. DAVEY, Clerk

Upon consideration of the pleadings, the cross motions for summary judgment which have been filed by Plaintiff, by Defendant International Union, United Mine Workers of America ("UMWA"), and by Defendants Davis, Huge, and Dean ("Defendant Trustees"), the affidavits, the parties' "Stipulation of Issues, Undisputed Facts and Disputed Facts" and exhibits thereto, and the parties' memoranda and oral argument; it appearing to the Court that there are no material facts in dispute with respect to whether or not the so-called "purchase-of-coal" provision of Section (d) of Article XX of the National Bituminous Coal Wage Agreement of 1974 (the "1974 Agreement") violates Section 1 of the Sherman Act, 15 U.S.C. §1 or any other antitrust law; as stated by this Court at the hearing on May 26, 1977, it appearing further that judgment should be entered dismissing Plaintiff's complaint insofar as it challenges the "purchase-of-coal" provision of Section (d) of Article XX of the 1974 Agreement as violating the antitrust laws; it appearing further that the parties have agreed that the remaining portion of Plaintiff's complaint, which challenges the "purchase-of-coal clause" as violating Section 8(e) of the National Labor Relations Act, 29 U.S.C. §158(e),

should be dismissed with prejudice; and it appearing further that the parties have agreed on condition to dismiss the Defendant Trustees' counterclaim with prejudice;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That Section (d) of Article XX of the National Bituminous Coal Wage Agreement of 1974 does not violate Section 1 of the Sherman Act, 15 U.S.C. §1, or any other antitrust law; and

2. That Plaintiff's complaint is hereby dismissed with prejudice; and

3. That Defendant Trustees' counterclaim is hereby dismissed with prejudice, conditioned upon payment by Plaintiff to the Defendant Trustees of all royalties due under the purchase-of-coal clause of the 1974 Agreement on coal procured or acquired by Plaintiff commencing December 6, 1974, and continuing through the term of said Agreement.

Dated: October 5, 1977 /s/ CHARLES R. RICHEY
United States District Judge

Seen and Approved:

/s/ PHILLIP J. SHEEHE
D. B. King
Phillip J. Sheehe
B. M. Tennant
Burt A. Braverman
Attorneys for Plaintiff

/s/ WILLARD P. OWENS
Willard P. Owens
Attorney for Defendant
United Mine Workers of America

/s/ STEPHEN J. POLLAK
Stephen J. Pollak
Attorney for Defendants
Davis, Huge and Dean

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1966

UNITED STATES STEEL CORPORATION,

Plaintiff.

v.

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL.,

Defendants.

MEMORANDUM OF AGREEMENT

Harry Huge, C. W. Davis, and Paul R. Dean (hereinafter the "Trustees"), the United Mine Workers of America (hereinafter "UMWA") and U.S. Steel Corporation (hereinafter "U.S. Steel") hereby agree to a disposition of this action on the following terms:

1. The settlement is conditioned upon the entry of the judgment attached hereto, or one which does not differ substantively therefrom. None of the parties will appeal from the judgment so entered.

2. Upon entry of the judgment, U.S. Steel will commence and continue paying royalties on coal procured or acquired after September 30, 1977, in accordance with the purchase-of-coal clause of Article XX(d) of the National Bituminous Coal Wage Agreement of 1974 ("1974 Agreement").

3. U.S. Steel agrees that during negotiations with the UMWA for any new contract to succeed the 1974 Agreement, including multiemployer contracts, it will not raise any legal objections to the inclusion in the new contract or contracts of a purchase-of-coal clause, substantively the same as the clause in the 1974 Agreement, and that it will not challenge the legality of any such purchase-of-coal clause agreed to as part of any such new contract. This agreement does not, however,

preclude U.S. Steel from objecting to such a clause on other, non-legal, grounds during the collective bargaining process.

4. U.S. Steel agrees to pay to the Trustees in accordance with the purchase-of-coal clause of the 1974 Agreement all royalties due on coal procured or acquired from December 6, 1974 through September 30, 1977. This obligation shall be limited to the tonnage royalty specified in the purchase-of-coal clause. As shown by the attached Schedule, U.S. Steel estimates that the amount of such royalties due on coal procured or acquired from December 6, 1974, through August 31, 1977, is $9,707,594.00. U.S. Steel will pay that amount to the Trustees not later than five (5) working days after entry of judgment. U.S. Steel will estimate the amount of such royalties due on coal procured or acquired from September 1 through September 30, 1977, and pay that amount to the Trustees when it pays the Trustees royalties due for coal produced by U.S. Steel during September 1977. If it is later determined by examination of U.S. Steel's records that the amount of all royalties due on coal procured or acquired from December 6, 1974 through September 30, 1977 is more or less than the amounts paid by U.S. Steel, appropriate adjustments will be made between the parties.

5. Each party shall bear its own costs and expenses of this litigation.

Dated: October 3, 1977 /s/ PHILLIP J. SHEEHE
D. B. King
B. M. Tennant
Phillip J. Sheehe
Counsel for U.S. Steel
600 Grant Street
Pittsburgh, Pennsylvania 15230

Dated: October 4, 1977 /s/ WILLARD P. OWENS
Harrison Combs
Willard P. Owens
Counsel for UMWA
900 Fifteenth Street, N.W.
Washington, D.C. 20005

Dated: October 5, 1977 /s/ STEPHEN J. POLLAK
Stephen J. Pollak
Ralph J. Moore
Wendy S. White
Counsel for Trustees
734 Fifteenth Street, N.W.
Washington, D.C. 20005

Office-Supreme Court, U.S.
FILED
SEP 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1345

IN THE

Supreme Court of the United States

October Term, 1980

KAISER STEEL CORPORATION,

Petitioner,

vs.

JULIUS MULLINS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF OF AMICI CURIAE, OPERATING ENGINEERS PENSION TRUST, OPERATING ENGINEERS HEALTH AND WELFARE FUND, OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST, OPERATING ENGINEERS JOURNEYMAN AND APPRENTICE TRAINING TRUST.

WAYNE JETT*,
JETT, CLIFFORD & LAQUER,
3055 Wilshire Boulevard,
Suite 420,
Los Angeles, Calif. 90010,
(213) 380-2082,

JULIUS REICH,
REICH, ADELL & CROST,
501 Shatto Place,
Suite 100,
Los Angeles, Calif. 90020,

Counsel for Amici Curiae, Operating Engineers Pension Trust, et al.
**Counsel of Record.*

August 31, 1981.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

QUESTION PRESENTED.

Whether an alleged unfair labor practice arising under Section 8(e) of the National Labor Relations Act should be entertained as a defense against enforcement of a collective bargaining agreement in a suit brought under Section 301 of the Labor-Management Relations Act.

TABLE OF CONTENTS

Page

Question Presented i

Nature of the Interest of the Southern California Trusts in the Proceeding 1

Summary of the Argument 4

Argument 7

An Alleged Unfair Labor Practice Arising Under Section 8(e) of the National Labor Relations Act Should Not Be Entertained as a Defense to Enforcement of a Collective Bargaining Agreement in a Suit Brought Under Section 301 7

A. The Decisions of This Court Have Carefully Protected the Primary Jurisdiction of the NLRB to Interpret and Enforce the Unfair Labor Practice Statutes 7

B. Declining to Entertain the Alleged Section 8(e) Defense in This Section 301 Action Pursuant to the Primary Jurisdiction Doctrine Would Not Deprive Kaiser of a Remedy, but Would Merely Limit Kaiser to the Administrative Forum Prescribed for Interpretation and Enforcement of the Unfair Labor Practice Statutes 10

C. Litigation of Section 8(e) Defenses in Section 301 Suits Is Not Permitted by the Congressional Design for Central Administration of the Unfair Labor Practice Statutes 12

1. The Section 301 Exception 12

2. The Words of Section 8(f) 14

3. Section 303 15

Page

D. Permitting Court Litigation of Section 8(e) Disputes Would Have a Significant, Adverse Effect Upon NLRB Administration of Section 8(e) 17

E. Permitting Litigation of Section 8(e) Disputes in Section 301 Cases Would Hamper the Enforcement of Collective Bargaining Agreements by Trustees of Employee Benefit Plans 19

Conclusion 20

TABLE OF AUTHORITIES

Cases	Page
Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)	3
Atchison, Topeka and Santa Fe Railway Company v. Locals 70, 85 and 315, Teamsters, 511 F.2d 1193 (9th Cir. 1975)	16
Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S.Ct. 1107 (1966)	18
Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 90 S.Ct. 1583 (1970)	18
Bricklayers, Local 2 (Associated General Contractors), 224 NLRB 1021, 92 LRRM 1347 (1976)	18
Carey v. Westinghouse Electric Corporation, 375 U.S. 261, 84 S.Ct. 401 (1964)	10
Charles Dowd Box Company v. Courtney, 368 U.S. 502, 82 S.Ct. 519, 7 L.Ed.2d 483 (1962)	12
Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552 (1947)	11
Garner v. Teamsters Union, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed 228 (1953)	7, 8, 13, 19
International Union of Operating Engineers, Local Union No. 12 (Griffith Company), 243 NLRB No. 153 (1979), app. pending sub nom. Griffith Company v. NLRB Nos. 79-7394, 80-7103 (9th Cir.)	15
Local 20, Teamsters v. Morton, 377 U.S. 252, 84 S.Ct. 1253 (1964)	16
Local 60, United Brotherhood of Carpenters v. NLRB, 365 U.S. 651, 81 S.Ct. 875 (1961)	14
Motor Coach Employees v. Lockridge, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971)	9, 12, 13, 19

Page

Mullins v. Kaiser Steel Corporation, 642 F.2d 1302 (D.C. Cir. 1980) 9

NLRB v. Enterprise Association, etc., Local Union No. 638, 429 U.S. 507, 97 S.Ct. 891, 51 L.Ed.2d 1 (1977) 15, 16

NLRB v. Industrial Union, 391 U.S. 418, 88 S.Ct. 1717 (1968) 18

NLRB v. Sears Roebuck & Company, 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975) 11, 17

National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612, 87 S.Ct. 1250 (1967) 12

Pacific Southwest Airlines v. NLRB, 611 F.2d 1309 (9th Cir. 1980) 17

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959) 8, 13, 19

Sears, Roebuck & Company v. San Diego County District Council of Carpenters, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978) 8

Sinclair Refining Company v. Atkinson, 370 U.S. 195, 82 S.Ct. 1328 (1962) 18

Smith v. Evening News Association, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962) 8, 9

U.A.W., Local 283 v. Scofield, 382 U.S. 205, 86 S.Ct. 373, 15 L.Ed.2d 272 (1965) 18

Waggoner v. Northwest Excavating Inc., 642 F.2d 333 (9th Cir. 1981) 2, 3, 4

Waggoner v. R. McGray, Inc., 607 F.2d 1229 (9th Cir. 1979) 2, 3, 7, 10

Page

Miscellaneous

Public Law 86-257, Title VII, Sec. 704(e), 73 Stat. 545 (Sept. 14, 1959) 15

Rule

Federal Rules of Civil Procedure, Rule 19(a) 19

Statutes

Employee Retirement Income Security Act of 1974 (ERISA) Sec. 3(21) (29 U.S.C. §1002(21)) 2

Employee Retirement Income Security Act of 1974 (ERISA) Sec. 401(a)(1) (29 U.S.C. §1104(a)(1)) ... 2

Labor-Management Relations Act of 1947, Sec. 301 (29 U.S.C. §185) ..... i, 2, 3, 4, 5, 6, 7 ..... 8, 9, 10, 11, 12, 13, 14, 15, 17, 19

Labor-Management Relations Act of 1947, Sec. 302 (29 U.S.C. §186) 15

Labor-Management Relations Act of 1947, Sec. 302(c)(5) (29 U.S.C. §186(c)(5)) 2

Labor-Management Relations Act of 1947, Sec. 303 (29 U.S.C. §187) 5, 14, 15, 16, 17

National Labor Relations Act, Sec. 8 .... 4, 5, 10, 12, 14, 15

National Labor Relations Act, Sec. 8(b)(4) 5, 15, 16, 17

National Labor Relations Act, Sec. 8(b)(4)(A) 16

National Labor Relations Act, Sec. 8(e) ..... i, 3, 4, 5 ..... 6, 7, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20

National Labor Relations Act, Sec. 8(f) 14

National Labor Relations Act, Sec. 10(b) (29 U.S.C. §160(b)) 18

National Labor Relations Act, Sec. 10(c) 14

United States Code, Title 29, Secs. 151-169 7

No. 80-1345

IN THE

Supreme Court of the United States

October Term, 1980

KAISER STEEL CORPORATION,

Petitioner,

vs.

JULIUS MULLINS, *et al.*,

Respondents.

BRIEF OF AMICI CURIAE, OPERATING ENGINEERS PENSION TRUST, OPERATING ENGINEERS HEALTH AND WELFARE FUND, OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST, OPERATING ENGINEERS JOURNEYMAN AND APPRENTICE TRAINING TRUST.

The written consents of the petitioner and the respondents having been filed in the Office of the Clerk, this brief of *amici curiae* is submitted on behalf of the Boards of Trustees of the Operating Engineers Pension Trust, Operating Engineers Health and Welfare Fund, Operating Engineers Vacation-Holiday Savings Trust and Operating Engineers Journeyman and Apprentice Training Trust ("Trustees" or the "Southern California Trusts").

NATURE OF THE INTEREST OF THE SOUTHERN CALIFORNIA TRUSTS IN THE PROCEEDING.

Each of the Southern California Trusts is a joint labor-management trust established by a written trust agreement

through collective bargaining between employers and a union in the building and construction industry as provided by Section 302(c)(5) of the Labor-Management Relations Act of 1947, as amended ("LMRA") [29 U.S.C. § 186(c)(5).]. The union is the International Union of Operating Engineers, Local Union No. 12 ("Local 12"). The Operating Engineers Pension Trust covers approximately 30,000 participants and receives monthly contributions from approximately 3,000 active employers located in Southern California and Southern Nevada. The remaining trusts cover comparable numbers of employers and participants. The Pension Trust receives payments from employers of about $6,000,000 per month and holds total assets of about $365,000,000 for the benefit of its participants. Employer contributions to the Operating Engineers Health & Welfare Fund currently average about $2,500,000 per month, and the Fund provides its participants medical benefits and related types of insurance through use of those amounts.

As fiduciaries within the meaning of Sections 3(21) and 401(a)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA") [29 U.S.C. §§1002(21), 1104(a)(1)], the Trustees of the Southern California Trusts enforce the obligations of employers to make payments to the Trusts as required by collective bargaining agreements between Local 12 and signatory employers. In the regular course of their duties, the Trustees often file suits under Section 301 of the LMRA [29 U.S.C. §185] against signatory employers who are believed to be delinquent in payments to the Trusts.

Specifically, the Southern California Trusts were plaintiffs in the cases of *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979), and *Waggoner v. Northwest Excavating, Inc.*, 642 F.2d 333 (9th Cir. 1981) (petition for

rehearing denied and suggestion for rehearing *en banc* rejected August 5, 1981). In *Waggoner v. R. McGray, Inc.*, (*"McGray"*), the U.S. Court of Appeals for the Ninth Circuit held that district courts may not decide the merits of an unfair labor practice defense to enforcement of a collective bargaining agreement in a Section 301 action, and that the district courts should decide contract issues presented in Section 301 actions without reference to unfair labor practice defenses. (607 F.2d at 1235-36.) In *McGray*, the employer seeking to raise the Section 8(e) defense had *not* filed a charge with the National Labor Relations Board ("NLRB" or "Board"). In *Waggoner v. Northwest Excavating, Inc.*, ("Northwest Excavating"), where the employer *had* filed a Section 8(e) charge which had been finally dismissed by the General Counsel of the NLRB, the Ninth Circuit again declined to entertain the Section 8(e) defense on grounds that collateral relitigation of charges dismissed by the NLRB, would be inconsistent with the policies expressed in *McGray*. (642 F.2d at 338, n. 2.)[1]

The Southern California Trusts view these decisions of the Ninth Circuit as fundamentally sound. This brief *amicus curiae* is respectfully submitted in an effort to assist the Court in preserving and developing the important national labor policies which underlie the *McGray* and *Northwest*

---

[1]In addition, in *Northwest Excavating* the Ninth Circuit ruled that a state statute may not provide the basis for awarding attorney's fees to the prevailing party in a Section 301 action, that state law may not be incorporated into a federal rule permitting award of attorney's fees in Section 301 actions without violating the strict limits imposed by this Court in *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), and that attorney's fees may be awarded where the parties so provide in their collective bargaining agreement. (642 F.2d at 338-39.)

Excavating decisions. This brief will not address the issues concerning the antitrust laws or the award of attorney's fees raised by the petitioner.

SUMMARY OF THE ARGUMENT.

The primary jurisdiction doctrine applicable to the NLRB provides the proper context for determining whether an alleged violation of Section 8(e) may be raised as a defense in a Section 301 action. At the heart of the primary jurisdiction doctrine is the congressional design for central administration of the Act by an expert agency. Where applicable, the primary jurisdiction doctrine entirely preempts the jurisdiction of federal and state courts over conduct arguably subject to the protection or prohibition of the Act.

Section 301 provides a statutory exception to the primary jurisdiction doctrine, allowing federal and state courts to remedy a breach of contract even when the same conduct is an unfair labor practice subject to the jurisdiction of the NLRB. However, court jurisdiction under Section 301 covers only the dispute governed by the terms of the collective bargaining agreement itself, and courts should properly proceed to enforce such contract rights without regard to any alleged unfair labor practice raised as a defense.

The Act places discretion in the General Counsel of the NLRB to dismiss an unfair labor practice charge arising under Section 8 of the Act or to file a complaint and prosecute the case as government litigation before the Board. The Board is given broad discretion in interpreting and applying the unfair labor practice statutes to effectuate the policies of the Act. A private party such as Kaiser has no right or remedy under the Act unless the General Counsel of the NLRB is persuaded to issue a complaint upon a filed charge. Kaiser has no constitutional basis for complaining of this statutory design, since a private party cannot claim

a statutory right while attacking the constitutionality of the statutory design for exercise of that right.

Authorizing state and federal trial courts to litigate Section 8(e) disputes raised as defenses to enforcement of collective bargaining agreements under Section 301 would leave nothing of the Board's primary jurisdiction over Section 8(e) cases. This Court's prior decisions do not permit such a result, and expressly teach that collective bargaining agreements should be enforced in Section 301 suits even where the enforcement involves permitting conduct arguably prohibited by Section 8 of the Act.

The words of Section 8(e) do not change the scope of the Section 301 exception to the primary jurisdiction doctrine. The words "unenforceable and void" in Section 8(e) are themselves under the exclusive jurisdiction of the NLRB for purposes of interpretation and application. The words "unenforceable and void" are limitations placed by Congress upon the Board's discretion to design appropriate remedial orders in cases involving a violation of Section 8(e). The Board gives full meaning to those words in that context.

Section 303 of the LMRA 1947 provides no support for litigating Section 8(e) disputes in Section 301 actions. Congress did not amend Section 303 to authorize suits for violation of Section 8(e). Even violations of Section 8(b)(4) are made unlawful by Section 303 expressly for the purpose of that section only. This express limitation in Section 303 precludes the litigation of Section 8(b)(4) issues in Section 301 suits. Under that circumstance, Section 303 cannot infuse Section 301 with jurisdiction over Section 8(e) disputes which cannot be litigated under Section 303 itself.

Permitting Section 8(e) defenses in suits by Trustees for enforcement of employer payments to employee benefit plans would greatly increase the complexity and cost of such

suits. The informed, orderly and uniform administration of the unfair labor practice statutes has been consistently protected by the primary jurisdiction doctrine and should be maintained by holding that Section 8(e) defenses will not be entertained in Section 301 actions.

ARGUMENT.

AN ALLEGED UNFAIR LABOR PRACTICE ARISING UNDER SECTION 8(e) OF THE NATIONAL LABOR RELATIONS ACT SHOULD NOT BE ENTERTAINED AS A DEFENSE TO ENFORCEMENT OF A COLLECTIVE BARGAINING AGREEMENT IN A SUIT BROUGHT UNDER SECTION 301.

A. The Decisions of This Court Have Carefully Protected the Primary Jurisdiction of the NLRB to Interpret and Enforce the Unfair Labor Practice Statutes.

The brief of petitioner Kaiser Steel Corporation ("Kaiser") presents an exhaustive discussion of judicial attitudes toward "illegality" as a defense to enforcement of contracts. By addressing its position in the case with such generality, Kaiser's brief never fully confronts the primary jurisdiction doctrine or the statutory scheme of the National Labor Relations Act (the "Act") and their significance to Kaiser's attempted assertion of rights under Section 8(e) in this case. In contrast, the previous decisions of this Court have carefully defined the limits of the statutory exception to the primary jurisdiction doctrine provided by Section 301.

The *McGray* decision of the Ninth Circuit presents a clear historical review of the evolution of the primary jurisdiction doctrine. (607 F.2d at 1232-35.) The primary jurisdiction doctrine as applied to the Act [29 U.S.C. §§151-169] began with the unanimous decision of this Court in *Garner v. Teamsters Union*, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228 (1953), which provides this discussion of congressional intent:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a

> specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so." 346 U.S. at 490-91, 74 S.Ct. at 166.

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773, 779-80, 3 L.Ed.2d 775 (1959), the Court held:

> "When an activity is arguably subject to Section 7 or Section 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . ."[2]

Section 301 provides an express statutory exception to the primary jurisdiction doctrine. In *Smith v. Evening News Association*, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962), where the conduct amounting to a breach of contract was conceded to be an unfair labor practice, this Court held:

---

[2]In this brief, as in *Sears, Roebuck & Company v. San Diego County District Council of Carpenters*, 436 U.S. 180, 199, 98 S.Ct. 1745, 1758, 56 L.Ed.2d 209, n. 29 (1978), the term "primary jurisdiction" refers to the *Garmon* doctrine which, where applicable, completely preempts court jurisdiction "unless the Board determines that the disputed conduct is neither protected nor prohibited by the federal Act."

> "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by Section 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under Section 301." 371 U.S. at 197, 83 S.Ct. at 269.

The Court provided further guidance on the scope of the Section 301 exemption from the primary jurisdiction doctrine in *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971), as follows:

> "We have exempted Section 301 suits from the *Garmon* principle because of the evident congressional determination that courts should be free to interpret and enforce collective bargaining agreements even where that process may involve condemning or permitting conduct arguably subject to the protection or prohibition of the National Labor Relations Act. The legislative determination that courts are fully competent to resolve labor relations disputes through focusing on the terms of a collective bargaining agreement cannot be said to sweep within it the same conclusion with regard to the terms of union-employee contracts that are said to be implied in law. That is why the principle of *Smith v. Evening News* is applicable only to those disputes that are governed by the terms of the collective bargaining agreement itself." 403 U.S. at 300-01, 91 S.Ct. at 1925.[3]

---

[3]Indeed, the reason that the primary jurisdiction doctrine may be said to have "no application to Section 301 suits" is only because the scope of the Section 301 exception to the primary jurisdiction doctrine is limited to litigation of breach of contract disputes governed by the terms of the collective bargaining agreement itself. The argument that the merits of a Section 8(e) violation may be litigated in a Section 301 suit because "the exclusive jurisdiction doctrine 'is inapplicable' to suits brought under Section 301" attempts to turn this logic inside out. *Cf.*, Kaiser's Brief, p. 42. Obviously, for the reasons stated in *Lockridge*, *McGray* and the Court of Appeals' decision in this case [*Mullins v. Kaiser Steel Corporation*, 642 F.2d 1302, 1315-16 (D.C. Cir. 1980)], the primary jurisdiction doctrine is both applicable and determinative when a party attempts improperly to litigate unfair labor practice issues in Section 301 actions.

In sum, the decisions of this Court preserve the exclusive jurisdiction of the NLRB over the investigation, prosecution and initial determination of unfair labor practices arising under Section 8 of the Act, while providing for litigation of breach of contract disputes "governed by the terms of the collective bargaining agreement itself" by the federal and state courts in Section 301 actions. *Cf., McGray*, 607 F.2d at 1235.

B. Declining to Entertain the Alleged Section 8(e) Defense in This Section 301 Action Pursuant to the Primary Jurisdiction Doctrine Would Not Deprive Kaiser of a Remedy, but Would Merely Limit Kaiser to the Administrative Forum Prescribed for Interpretation and Enforcement of the Unfair Labor Practice Statutes.

Kaiser's argument that the Section 8(e) defense should be entertained in this action arises not from the absence of a remedy as provided by the statute, but from the desire for a choice of forum. Obviously, if the actions of the respondents in pursuing their claims against Kaiser under the disputed clauses amounted to a violation of Section 8(e), Kaiser could yet file an unfair labor practice charge with the General Counsel of the NLRB. And, if the General Counsel deemed the charge meritorious, the General Counsel could issue a complaint and seek to invoke "the superior authority of the Board." *Carey v. Westinghouse Electric Corporation*, 375 U.S. 261, 272, 84 S.Ct. 401, 409 (1964). If the Board and any reviewing court were to find a violation of Section 8(e) in the respondents' prosecution of this action, the Board could fashion a remedy suitable for the existing circumstances, including consideration of any judgment paid by Kaiser in this Section 301 suit.

Absent the initiation of an appropriate charge by Kaiser before the General Counsel of the NLRB, Kaiser has no claim of right or remedy under Section 8(e).

> "In those cases in which he decides that a complaint shall issue, the General Counsel [of the NLRB] becomes an advocate before the Board in support of the complaint. In those cases in which he decides not to issue a complaint, no proceeding before the Board occurs at all. *The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of the General Counsel that his claim is sufficiently meritorious to warrant Board consideration.*" (Emphasis added.) *NLRB v. Sears, Roebuck & Company*, 421 U.S. 132, 138-39, 95 S.Ct. 1504, 1510-11, 44 L.Ed.2d 29 (1975).

Kaiser is entitled to claim rights under the Act only according to the processes prescribed by the Act. Having failed to invoke the processes of the Board, Kaiser is not entitled to complain elsewhere of the alleged statutory violation.[4]

---

[4]Kaiser's references to a claimed violation of the constitutional principle of separation of powers is frivolous. (See Kaiser's Brief, pp. 44-47.) Congress certainly is empowered to enact one statute (Section 301) granting jurisdiction to the federal courts over contract enforcement actions, while enacting another statute [Section 8(e)] reflecting a public policy whose interpretation and enforcement is restricted to the exclusive jurisdiction of a central administrative agency and appellate courts with limited powers of review. The rule is well settled that a party may not rely upon a statutorily created right and, at the same time, attack the constitutionality of other requirements and restrictions on that right contained in the same integrated statutory scheme.

> "It is an elementary rule of constitutional law that one may not 'retain the benefits of the Act while attacking the constitutionality of one of its important conditions.' . . .
>
> 'The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.' " *Fahey v. Mallonee*, 332 U.S. 245, 255, 67 S.Ct. 1552, 1557 (1947).

Kaiser cannot claim a right under Section 8(e) and then complain that Congress has required that the right be pursued and adjudicated exclusively through the processes of the NLRB.

C. Litigation of Section 8(e) Defenses in Section 301 Suits Is Not Permitted by the Congressional Design for Central Administration of the Unfair Labor Practice Statutes.

1. The Section 301 Exception.

"Centralized administration of specially designed procedures . . ." which entails "deliberately placing the responsibility for applying and developing this comprehensive legal system [the Act] in the hands of an expert administrative body rather than the federalized judicial system" is clearly at the heart of the doctrine which preempts the jurisdiction of federal and state courts over conduct arguably prohibited or protected by Section 8 of the Act. *Motor Coach Employees v. Lockridge, supra*, 403 U.S. at 285-289, 91 S.Ct. at 1917-19. And, as the Court of Appeals stated in the opinion below:

> "If an employer were allowed to interpose the Section 8(e) defense in any suit to enforce a collective bargaining agreement, there would be nothing left of the Board's primary jurisdiction for Section 8(e) cases." 642 F.2d at 1316.

Since state courts have concurrent jurisdiction of Section 301 actions [*Charles Dowd Box Company v. Courtney*, 368 U.S. 502, 82 S.Ct. 519, 7 L.Ed.2d 483 (1962)], granting Kaiser's wish to litigate Section 8(e) would place the interpretation and enforcement of perhaps the most complex of the unfair labor practice statutes within the purview of every court in this country.[5] Thus, Kaiser's contention would expand to the greatest extreme the "multiplicity of tribunals"

---

[5]"This will not always be a simple test to apply. But '[h]owever difficult the task of drawing lines more nice than obvious, the statute compels the task.' " *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 645, 87 S.Ct. 1250, 1269 (1967).

which this Court has recognized as the primary threat to the statutory design enacted by Congress. *Garner v. Teamsters Union, supra,* 346 U.S. at 491, 74 S.Ct. at 166.

This Court has never found in Section 301 any expression of congressional intent to undercut the primary jurisdiction of the Board over interpretation and enforcement of the unfair labor practice statutes. To the contrary, the careful efforts of this Court in making "a fuller explication" of the *Garmon* doctrine of preemption (*Motor Coach Employees v. Lockridge, supra,* 403 U.S. at 277, 91 S.Ct. at 1913) specifically defined the scope of the Section 301 exemption from the *Garmon* principle as "applicable only to those disputes that are governed by the terms of the collective bargaining agreement itself." *Id.*, 403 U.S. at 300-01, 91 S.Ct. at 1925. The congressional intent pertinent in this case could hardly be expressed more clearly than as follows:

> "We have exempted Section 301 suits from the *Garmon* principle because of the evident congressional determination that courts should be free to interpret and enforce collective bargaining agreements *even where that process may involve condemning or permitting conduct arguably subject to the protection or prohibition of the National Labor Relations Act.*" (Emphasis added.) *Id.*

In the context of this case, the decision of the Court of Appeals merely proceeds with enforcement of the collective bargaining agreement, "even where that process may involve . . . permitting conduct arguably subject to the . . . prohibition of [Section 8(e)]." Thus, the scope and intent of Section 301 as previously determined by this Court clearly does not provide the basis for undercutting the statutory scheme of central administration of the Act.

2. The Words of Section 8(f).

Aside from Section 301, Kaiser has identified two other statutes as potential indications of congressional intent that Section 8(e) disputes be litigated in Section 301 actions. Those two additional statutes are Section 8(e) itself and Section 303 of the LMRA [29 U.S.C. §187]. Kaiser relies most heavily on the words "unenforceable and void" which appear in Section 8(e). (Kaiser's Brief, pp. 35-41.) The most readily apparent flaw in Kaiser's reliance on the "unenforceable and void" words of Section 8(e) is that Congress placed those words within Section 8 of the Act and, thereby, within the exclusive jurisdiction of the NLRB for purposes of interpretation and enforcement. Thus, this proffered rationale for lifting Section 8(e) disputes out of central administration of the NLRB is, indeed, a "bootstrap" argument.

Kaiser seems to contend that the words "unenforceable and void" can have no meaning except to require litigation of Section 8(e) disputes by courts. In actuality, the words of the statute are given full meaning by the NLRB in fashioning appropriate remedies after determining on the merits that a Section 8(e) violation has occurred. The NLRB has broad discretion under Section 10(c) of the Act to adapt its remedies to the needs of particular situations in order to "effectuate the policies of [the] Act", but the power of the Board is limited to remedial, not punitive, affirmative orders which are to be "in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation . . ." *Local 60, United Brotherhood of Carpenters v. NLRB*, 365 U.S. 651, 655, 81 S.Ct. 875, 877 (1961). The Congress was certainly free to place additional guidelines and limits upon Board remedies for violations of Section 8(e), and did so by requiring the Board to make such unlawful agreements "unenforceable and

void." The Board regularly gives effect to the words of the statute by ordering that the charged party "cease and desist from entering into, maintaining, giving effect to, or enforcing . . ." the offending agreement. *See, e.g., International Union of Operating Engineers, Local Union No. 12 (Griffith Company)*, 243 NLRB No. 153 (1979); *appeal pending sub nom. Griffith Company v. NLRB*, Nos. 79-7394, 80-7103 (9th Cir.) This application of the words "unenforceable and void" is consistent with the remedial purpose of Congress and "fall[s] well within that category of situations in which the courts should defer to the agency's understanding of the statute which it administers." *NLRB v. Enterprise Association, etc., Local Union No. 638*, 429 U.S. 507, 528, 97 S.Ct. 891, 903, 51 L.Ed.2d 1 (1977).

As reflected by this long established precedent, Section 8(e) was committed by Congress to the exclusive jurisdiction of the NLRB, and nothing in the wording of the statute itself suggests that Section 8(e) is an exceptional unfair labor practice intended to be litigated in the courts.

3. Section 303.

Congress has been well aware of the distinction between placing its statutory enactments within Section 8 of the Act, and placing enactments in the broader context of the LMRA. Sections 301, 302 and 303 of the LMRA [29 U.S.C. §§185, 186, 187] reflect national labor policies outside the primary jurisdiction of the NLRB. When Section 8(e) was enacted in 1959, Congress was also amending Section 303. The 1959 amendment to Section 303 eliminated the specific wording which had been parallel to the wording of Section 8(b)(4) of the Act. The amended Section 303 specifies the prohibited activity by reference to Section 8(b)(4). Pub.L. 86-257, Title VII, §704(e), 73 Stat. 545 (Sept. 14, 1959).

Section 8(b)(4) makes the use of strikes, threats or other forms of pressure in support of a secondary boycott an unfair labor practice. *NLRB v. Enterprise Association, etc., supra,* 429 U.S. at 528-31, 97 S.Ct. at 903-05. Section 8(b)(4)(A) prohibits the use of strikes, threats or other pressure to require an employer to enter into an agreement prohibited by Section 8(e). Congress' view of this conduct was such that Section 303 was enacted outside the channels of NLRB processes to provide immediate redress for employers coming within the protection of the statute. However, the willingness of Congress to authorize court adjudication of disputes involving economic pressure condemned by Section 8(b)(4) is no indication that this exception to the primary jurisdiction of the Board is intended to be broader than specifically written by Congress.

> "[S]ection 303(a) comprehensively and with particularity 'describes and condemns specific union conduct directed to specific objectives.' " *Local 20, Teamsters v. Morton,* 377 U.S. 252, 258, 84 S.Ct. 1253, 1258 (1964).

If Congress wished, Section 303 could have been amended specifically to authorize suits to invalidate agreements prohibited by Section 8(e).[6] Instead, Section 303 makes a violation of Section 8(b)(4) unlawful "for the pur-

---

[6]The Ninth Circuit has declined to read into Section 303 such an amendment which Congress declined to enact.

> "Plaintiff argues that in order to effectuate fully the Congressional purpose expressed in [Section 303], the court should read this highly specific provision as embracing [Section 8(e)] as well as [Section 8(b)(4)] within the grounds for suit in the District Court. Congress is perfectly free to broaden the scope of [Section 303] in the manner urged by plaintiff; this court is not free to do so. The court must presume that Congress, in its 1959 amendments adding Subsection [8(e)] to the NLRA, could have amended [Section 303] with equal facility, had it chosen to do so." *Atchison, Topeka and Santa Fe Railway Company v. Locals 70, 85 and 315, Teamsters,* 511 F.2d 1193, 1195 (9th Cir. 1975).

pose of this section only . . ." Such a carefully drawn limitation cannot be ignored in its implications for whether Section 303 issues may be litigated as defenses in Section 301 actions. The clear intent and effect of the language "for purpose of this section only" preclude litigation of an alleged Section 8(b)(4) violation as a defense in a Section 301 action. If Section 303 expressly prohibits litigating a Section 8(b)(4) violation as a defense in a Section 301 action, then certainly Section 303 provides no support for permitting litigation of alleged Section 8(e) violations in Section 301 suits.

Congress did not permit an alleged violation of Section 8(e) to be litigated under Section 303. Having withheld such a remedy from the provisions of Section 303, Congress would not have intended that Section 303 be used as the rationale for infusing Section 301 with the authority withheld from Section 303. Interpretation and enforcement of Section 8(e) should remain the primary jurisdiction of the Board.

D. Permitting Court Litigation of Section 8(e) Disputes Would Have a Significant, Adverse Effect Upon NLRB Administration of Section 8(e).

Little more need be said about the implications of a "multiplicity of tribunals" for the administration of Section 8(e). However, a limited review of developments to be anticipated may be useful.

The broad discretion granted to the General Counsel of the NLRB by the Congress to investigate and select the Section 8(e) disputes to be litigated before the Board would be undercut significantly. *Cf., NLRB v. Sears, Roebuck & Company, supra,* 421 U.S. at 138-39, 95 S.Ct. at 1510-11; *Pacific Southwest Airlines v. NLRB,* 611 F.2d 1309, 1311-12 (9th Cir. 1980). Private parties wishing to pursue

Section 8(e) disputes, particularly those parties with *unmeritorious* claims,[7] would present their claims to a judicial forum, thereby depriving the General Counsel of the opportunity to make an early disposition of the dispute[8] or provide the Board the opportunity to rule on the merits of the dispute.

The enforcement of Section 8(e) would be transformed from a public policy intended to be pursued by the General Counsel as "government litigation" [*see, Sinclair Refining Company v. Atkinson*, 370 U.S. 195, 221-222, 82 S.Ct. 1328, 1342 (1962), dissenting opinion later embraced as the majority view in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 90 S.Ct. 1583 (1970)] into private litigation subject to the purposes and compromises of private parties.[9] Trial court decisions on Section 8(e) issues would undoubtedly result in appellate review. Appellate decisions on Section 8(e) issues presented by private litigants would then hold the potential for influencing or controlling the disposition of Section 8(e) issues presented by the NLRB. Even if some courts and some private counsel have the expertise and resources to develop a complete and

---

[7]Apparently Kaiser is convinced that the General Counsel of the NLRB would find no merit in its charge, because Kaiser could have (and could still) put its allegations of a Section 8(e) violation in a charge filed with the General Counsel. The six month period of Section 10(b) of the Act [29 U.S.C. §160(b)] would not bar such a charge even at this late date, because the Board could find a continuing violation based upon the view that parties "have entered into the disputed clauses within the 10(b) period by their continuing reaffirmance of the enforceability of those clauses. . . ." *Bricklayers, Local 2 (Associated General Contractors)*, 224 NLRB 1021, 92 LRRM 1347, 1351 (1976).

[8]Of course, prompt determination of labor disputes is a primary goal of the Act. *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 707, 86 S.Ct. 1107, 1114 (1966). *U.A.W., Local 283 v. Scofield*, 382 U.S. 205, 213, 86 S.Ct. 373, 379, 15 L.Ed.2d 272 (1965).

[9]"A proceeding by the Board is not to adjudicate private rights but to effectuate a public policy." *NLRB v. Industrial Union*, 391 U.S. 418, 424, 88 S.Ct. 1717, 1721 (1968).

pertinent factual record for the proper determination of Section 8(e) issues, many courts and private counsel do not. That circumstance would sacrifice completely the informed, orderly and uniform administration of the unfair labor practice statutes which has been central to the intent of Congress.

E. Permitting Litigation of Section 8(e) Disputes in Section 301 Cases Would Hamper the Enforcement of Collective Bargaining Agreements by Trustees of Employee Benefit Plans.

The additional burden and expense imposed on courts and trustees of employee benefit plans in permitting litigation of Section 8(e) issues in Section 301 cases for recovery of fringe benefit contributions would be considerable. Rule 19(a), F.R.Civ.P., apparently would require joinder of the union and any signatory employer associations in light of the potential impairment of their interests if their agreement is declared invalid in any respect. As indicated by the record in this case, Section 8(e) issues are relatively complex in comparison to breach of contract issues. Although Kaiser recites a long historical perspective of the disputed clauses in this case, the record presented appears to be merely one employer's view of industry-wide experiences and events. If this Court were to open the door to full blown litigation of Section 8(e) in the courts, counsel for unions and employer associations could be expected to contribute their efforts toward a burgeoning trial court record.

The merits of unfair labor practice issues should be left to the NLRB for determination. The policies developed in *Garner*, *Garmon* and *Lockridge* should be maintained by holding that Section 8(e) defenses will not be entertained in Section 301 actions.

CONCLUSION.

Based on the foregoing, the holding of the Court of Appeals that petitioner's alleged Section 8(e) defense will not be entertained should be affirmed.

August 31, 1981.

Respectfully submitted,

WAYNE JETT*,
JETT, CLIFFORD & LAQUER,
JULIUS REICH,
REICH, ADELL & CROST,
Counsel for Amici Curiae, Operating Engineers Pension Trust, et al.
**Counsel of Record.*

CORRECTED COPY

Office-Supreme Court, U.S.
FILED
JUL 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF AMICUS CURIAE OF MID-AMERICA LEGAL FOUNDATION IN SUPPORT OF PETITIONER

JAMES D. HUTCHINSON
(Counsel of Record)
EDWARD R. LEAHY
SAMUEL M. SIPE, JR.
ILDIKO POGANY DEANGELIS
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2087
Attorneys for Amicus Curiae Mid-America Legal Foundation

Of Counsel:
JOHN M. CANNON
SUSAN W. WANAT
20 North Wacker Drive
Suite 2245
Chicago, Illinois 60606
(312) 263-5163

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE ILLEGALITY OF A CONTRACT PROVISION UNDER THE ANTITRUST LAWS IS A VALID DEFENSE IN AN ACTION TO ENFORCE THAT PROVISION	4
II. BECAUSE CONTRACT PROVISIONS THAT VIOLATE SECTION 8(e) OF THE LMRA ARE "UNENFORCIBLE AND VOID," SECTION 8(e) PROVIDES A VALID DEFENSE TO A CONTRACT ENFORCEMENT ACTION	9
III. ADOPTION OF THE COURT OF APPEALS' DECISION WOULD IMPEDE THE COLLECTIVE BARGAINING PROCESS AND WOULD PROMOTE UNNECESSARY AND DUPLICATIVE LITIGATION	13
CONCLUSION	18

TABLE OF AUTHORITIES

CASES: Page

Associated Press v. *Taft-Ingalls Corp.*, 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965) 5, 7, 8
Bement v. *National Harrow Co.*, 186 U.S. 70 (1902) 3, 4
Caminetti v. *United States*, 242 U.S. 470 (1917) .. 10
Connell Construction Co. v. *Plumbers & Steam Fitters Local Union No. 100*, 421 U.S. 616 (1975) 12
Connolly v. *Union Sewer Pipe Co.*, 184 U.S. 540 (1902) 5
Continental Wall Paper Co. v. *Louis Voight & Sons Co.*, 212 U.S. 227 (1909) 5
Farbenfabriken Bayer A.G. v. *Sterling Drug, Inc.*, 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 207 (1963) 5, 8
Fibreboard Paper Products Corp. v. *NLRB*, 379 U.S. 203 (1964) 14
Kelly v. *Kosuga*, 358 U.S. 516 (1959) ..... *passim*
McMullen v. *Hoffman*, 174 U.S. 639 (1899) 4, 8
National Woodwork Manufacturers Association v. *NLRB*, 386 U.S. 612 (1967) 13, 17
NLRB v. *Amalgamated Lithographers of America (IND.)*, 309 F.2d 81 (9th Cir. 1962), *cert. denied*, 372 U.S. 943 (1963) 15
NLRB v. *Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & General Pipefitters, Local Union No. 638*, 429 U.S. 507 (1977) 17
NLRB v. *International Longshoremen's & Warehousemen's Union, Local No. 13*, 549 F.2d 1346 (9th Cir.), *cert. denied*, 434 U.S. 922 (1977) 15
Rubin v. *United States*, 49 U.S.L.W. 4103 (1981) .. 10
Sola Electric Co. v. *Jefferson Electric Co.*, 317 U.S. 173 (1942) 5, 7
Tire Sales Corp. v. *Cities Service Oil Co.*, 637 F.2d 467 (7th Cir. 1980) 5, 7

TABLE OF AUTHORITIES—Continued

Page

Transamerica Mortgage Advisors, Inc. (TAMA) v. *Lewis*, 444 U.S. 11 (1979) 10, 11, 12
United Association of Journeymen v. *Local 334*, 49 U.S.L.W. 4755 (1981) 10
United Electrical, Radio & Machine Workers of America v. *NLRB*, 409 F.2d 150 (D.C. Cir. 1969) 14, 15
United States v. *Loew's, Inc.*, 371 U.S. 38 (1962) .. 9

STATUTES:

Investment Advisers Act of 1940:
15 U.S.C. § 80b-15 (1976) 10
Labor-Management Relations Act:
29 U.S.C. § 151 (1976) 14
29 U.S.C. § 158(a)(1) (1976) 15
29 U.S.C. § 158(a)(5) (1976) 15
29 U.S.C. § 158(b)(3) (1976) 15
29 U.S.C. § 158(d) (1976) 15
29 U.S.C. § 158(e) (1976) ..... *passim*

OTHER AUTHORITIES:

National Bituminous Coal Wage Agreement of 1981 (Signed May 28, 1981 and Ratified June 6, 1981) 8
National Labor Relations Board, 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (1959) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1345

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF MID-AMERICA LEGAL FOUNDATION IN SUPPORT OF PETITIONER

This brief in support of petitioner is submitted with the written consent of counsel to both parties filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

Mid-America Legal Foundation ("Mid-America") was organized in 1975 as an Illinois not-for-profit corporation to engage in non-partisan legal research, study, and analysis for the benefit of the general public as to the effect of evolving concepts of law on our democratic institutions and to provide legal representation on matters of public interest at all levels of the judicial process. Mid-America takes special interest in questions of law of a national scope that originate in or have a direct effect on the Mid-America region.

Mid-America has an interest in this case because the decision below is at odds with fundamental goals of national labor relations policy. That policy seeks to eliminate unfair labor practices which impair the interest of the public in the free flow of commerce and to encourage the resolution of labor disputes through collective bargaining. By precluding employers from raising the defense that a provision in a collective bargaining agreement violates Section 8(e) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 158(e) (1976), the decision below means that at least some contract provisions that violate Section 8(e) would be upheld. Moreover, by denying employers the right to raise the illegality defense, the court of appeals' decision would impede the collective bargaining process by deterring employers from signing collective bargaining agreements that contain provisions of questionable legality, thereby increasing the likelihood of impasse and economically damaging strikes. If employers did sign agreements containing clauses of suspect legality, they would be forced to resort to litigation to preserve their rights.

In a broader context, Mid-America has an interest in this case because of its potential impact on the enforceability of contracts in general. The public has a reasonable expectation that courts will not lend their hand to the enforcement of illegal contracts, including contracts that violate the antitrust laws. This expectation is undermined by the decision below, which would make the courts parties to the carrying-out of unlawful activity by declining to entertain illegality defenses and, in effect, refraining from inquiring into the consequences of their judgments.

SUMMARY OF ARGUMENT

I.

This Court has long recognized that the illegality of a contract under the Sherman Act is a good defense in an action to enforce that contract. *Bement* v. *National Harrow Co.*, 186 U.S. 70, 88 (1902). In applying this rule, courts have distinguished between those cases in which the very contract provision which is sought to be enforced is allegedly illegal and cases in which the contract sought to be enforced is merely collateral to an allegedly illegal scheme. The decision below, which ignores this distinction, was based on an erroneous interpretation of *Kelly* v. *Kosuga*, 358 U.S. 516 (1959). As properly applied to this case, *Kelly* requires that Kaiser Steel Corporation ("Kaiser") be permitted to raise its antitrust illegality defense because the purchase-of-coal provision that the Trustees seek to enforce is precisely that provision which Kaiser contends is illegal.

II.

The court of appeals held that Kaiser could not raise the defense that the purchase-of-coal provision is an illegal "hot cargo" clause that violates Section 8(e) of the LMRA. In so doing, the court disregarded the unambiguous directive of Section 8(e) that "hot cargo" clauses are "unenforcible and void." Denial of the Section 8(e) illegality defense is directly contrary to the statutory mandate because it places courts in the position of enforcing contract provisions that are "unenforcible and void."

III.

National labor relations policy seeks to promote industrial peace and the free flow of commerce by encouraging the resolution of disputes between labor and management in the collective bargaining process. The decision below is inconsistent with these salutory purposes because it

would encourage employers to bargain to impasse and precipitate damaging strikes rather than to allow provisions of suspect legality to be included in collective bargaining agreements.

If an employer ultimately determined that in order to avert or end a strike it was necessary to include a provision of suspect legality in a collective bargaining agreement, he would, under the court of appeals' decision, be forced to resort to litigation to preserve his illegality claim. The option of mutually forbearing from enforcing or challenging the suspect provision, thereby avoiding unnecessary litigation, would be lost.

ARGUMENT

I. THE ILLEGALITY OF A CONTRACT PROVISION UNDER THE ANTITRUST LAWS IS A VALID DEFENSE IN AN ACTION TO ENFORCE THAT PROVISION.

The court of appeals' decision that the district court was not obliged to entertain Kaiser's antitrust illegality defense directly contravenes the teachings of this Court. As early as 1902, the Court stated that "any one sued upon a contract may set up as a defence that it is a violation of [the Sherman Act], and if found to be so, that fact will constitute a good defence to the action." *Bement* v. *National Harrow Co.*, 186 U.S. 70, 88 (1902).[1]

In applying the rule that the illegality of a contract or particular provision thereof under the antitrust laws

---

[1] This rule is a natural outgrowth of the principle that courts may not enforce unlawful contracts. In McMullen v. Hoffman, 174 U.S. 639, 654 (1899), the Court stated:

> The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract.

is a valid defense,[2] courts have distinguished between (1) cases in which the contract itself is violative of the antitrust laws, and (2) cases in which the contract is merely collateral or ancillary to an illegal scheme.[3] This distinction proved to be critical in *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), which the court of appeals found to be dispositive.

In *Kelly*, the parties entered into a contract for the sale of onions. This contract was distinct from another agreement entered into by the parties to the action and various third parties whereby they all agreed to refrain from delivering any onions on the futures market. The purpose of the nondelivery agreement was to fix the price of onions. The seller tendered the onions pursuant to the valid sales agreement, but the buyer paid for only a portion of them. When the seller sued for the unpaid purchase price, the buyer interposed the defense that the sale was made pursuant to an agreement that violated the Sherman Act. In upholding the district court's grant of summary judgment in favor of the seller, this Court clearly distinguished between the agreement for the sale of the onions, which was the subject of the suit, and the illegal nondelivery agreement that the buyer had sought to raise as a defense. The Court held:

> [W]hile the nondelivery agreement between the parties could not be enforced by a court, if its unlawful character under the Sherman Act be assumed,

---

[2] Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227 (1909); Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942); Farbenfabriken Bayer A.G. v. Sterling Drug, Inc., 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 207 (1963); Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965); Tire Sales Corp. v. Cities Serv. Oil Co., 637 F.2d 467 (7th Cir. 1980).

[3] *See, e.g.*, Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 549 (1902).

> it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price.

Id. at 521.

Thus the Court confirmed that contract provisions that violate the Sherman Act will not be enforced, for to enforce them would be "to make the courts a party to the carrying out of . . . the very restraints forbidden by the Sherman Act." *Id.* at 520. It also held that lawful contracts which are separable from an agreement that violates the antitrust laws are enforceable:

> [W]here, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question.

Id. at 521.

The case at bar presents essentially the same elements as in *Kelly*, with one critical difference that mandates a different result; the roles of the legal and illegal contract provisions are the reverse of those in *Kelly*. Here the purchase-of-coal provision that the Trustees seek to enforce is precisely that provision which Kaiser alleges to be violative of the Sherman Act; in *Kelly*, it was the lawful contract for the sale of onions whose enforcement was sought. The lawful portions of the 1974 collective bargaining agreement are not at issue in this litigation, just as the unlawful nondelivery agreement was not the subject of the contract action in *Kelly*, although the defendant there attempted to interpose it as a defense.

The application of the two-pronged holding of *Kelly* to the instant set of facts dictates the proper result here. *Kelly* permits the enforcement of the lawful portions of the collective bargaining agreement, which indeed have

already been performed, but makes it clear that the purchase-of-coal clause "could not be enforced by a court, if its unlawful character under the Sherman Act be assumed . . . ." *Id.* If a district court may not enforce the purchase-of-coal provision, then, *a fortiori*, it may not simply disregard the antitrust illegality defense.

The court of appeals has turned *Kelly* on its head by focusing on the result of the case—rejection of the antitrust illegality defense—rather than the applicable legal principle. In doing so, the court of appeals apparently made the erroneous assumption that courts are precluded from enforcing only contract provisions that constitute facial violations of the antitrust laws and have no obligation to inquire into the anticompetitive purposes and effects of allegedly illegal provisions. *Mullins* v. *Kaiser Steel Corp.*, 642 F.2d 1302, 1310 n.7 (D.C. Cir. 1980). This failure to look beyond the face of an allegedly unlawful contract provision could make the courts parties to the enforcement of illegality, which is precisely what *Kelly* prohibits.[4]

The court of appeals also misconstrued *Kelly* by suggesting that enforcement of the purchase-of-coal provi-

---

[4] Cases decided both prior to and subsequent to *Kelly* make it clear that once it is established that the contract provision in question is itself the source of the alleged illegality, courts are obliged to look into the substance of those allegations. Sola Elec. Co. v. Jefferson Elec. Co., *supra*, 317 U.S. at 177 ("[P]etitioner may assert the illegality of the price-fixing agreement and may offer any competent evidence to establish its illegality."); Tire Sales Corp. v. Cities Serv. Oil Co., *supra*, 637 F.2d at 477 ("[I]t was premature to grant summary judgment" denying an antitrust illegality defense asserted against a counterclaim "until plaintiff's antitrust allegations are finally resolved after a full trial."); Associated Press v. Taft-Ingalls Corp., *supra*, 340 F.2d at 764 (Although there was "no tying arrangement . . . spelled out expressly in the contract between the parties," the Court looked to the facts to find a violation of the Sherman Act and upheld the antitrust illegality defense.).

sion would merely bring about what the court deemed to be the lawful result of requiring that payments be made to the funds. 642 F.2d at 1310. This assertion disregards Kaiser's contention that enforcement of the provision would consummate its illegality by imposing a penalty on Kaiser.[5] Such enforcement also would tend to perpetuate the anticompetitive consequences of a substantially identical provision that is included in the recently ratified contract between the United Mine Workers of America and the Bituminous Coal Operators' Association.[6] A decision which made it clear to signa-

---

[5] The court of appeals' approach erroneously suggests that a court could enforce a provision that violated the antitrust laws once the contract in question had run its course. Whether or not a court becomes a party to the enforcement of an unlawful agreement cannot logically depend on the timing of the enforcement action. Consider, for example, the following possibility arising out of the facts of *Kelly* itself. Suppose the nondelivery agreement in *Kelly* were in existence and that party *A* learned that party *B* intended to violate that specific illegal agreement (not the valid agreement for the sale of onions) by delivering onions on the futures market. In an action by *A* to enforce the contract by having the court enjoin *B* from delivering the onions on the futures market, *B*'s antitrust illegality defense clearly would prevail because enforcement of the contract by the court would give rise to "one of the very restraints forbidden by the Sherman Act," 358 U.S. at 520—a restriction of the onion trade. Assume, however, that *B* delivered the onions on the futures market before *A* could learn of it and that *A* subsequently brought a contract action seeking damages for breach of their nondelivery agreement. Enforcement of the contract by the court would not bring about a restraint in the onion trade but it would surely consummate the unlawful agreement under judicial auspices. The defense of antitrust illegality undoubtedly would be upheld in both situations. *See* McMullen v. Hoffman, *supra*, 174 U.S. at 660; Farbenfabriken Bayer A.G. v. Sterling Drug, Inc., *supra*, 307 F.2d at 209; Associated Press v. Taft-Ingalls Corp., *supra*, 340 F.2d at 769.

[6] The National Bituminous Coal Wage Agreement of 1981 provides in Article XX, Section (d)(1)(v) that:

> [E]ach signatory Employer shall . . . contribute to the Trusts . . . amounts . . . on each ton of . . . bituminous coal after

tories of the current agreement that they would be liable for purchase-of-coal payments if they bought coal from non-signatory companies would surely deter some of the former companies from purchasing from the latter. Thus, enforcement of the clause would effect both of the anti-competitive consequences alleged by Kaiser. *Kelly* cannot be read to condone such a result.

The court of appeals' misapplication of *Kelly* threatens to undermine the established principle that courts will not enforce contract provisions that violate the antitrust laws and would deprive future litigants of the only realistic opportunity they might have to raise a legitimate defense of antitrust illegality. Such a result would not only be unfair in this and other individual cases that might arise, but it would undermine the integrity of the antitrust laws themselves. As this Court has stated:

> [T]he thrust of the antitrust laws cannot be avoided merely by claiming that the otherwise illegal conduct is compelled by contractual obligations. Were it otherwise, the antitrust laws could be nullified. Contractual obligations cannot thus supercede statutory imperatives.

United States v. *Loew's, Inc.*, 371 U.S. 38, 51 (1962).

II. BECAUSE CONTRACT PROVISIONS THAT VIOLATE SECTION 8(e) OF THE LMRA ARE "UNENFORCIBLE AND VOID," SECTION 8(e) PROVIDES A VALID DEFENSE TO A CONTRACT ENFORCEMENT ACTION.

In refusing to allow Kaiser to assert the defense that the purchase-of-coal provision is an illegal "hot cargo"

---

production by another operator, procured or acquired by such Employer for use or for sale on which contributions to the appropriate Trusts as provided . . . have not been made . . . .

Settlement was reached by the bargaining parties on May 28, 1981, and the agreement was ratified by the rank and file on June 6, 1981.

clause that violates Section 8(e) of the Labor-Management Relations Act, 29 U.S.C. § 158(e) (1976), the court of appeals disregarded an unmistakeable statutory directive.[7] Section 8(e) provides that any agreement entered into between a labor organization and an employer that contains a "hot cargo" clause "shall be to such extent unenforcible and void." The meaning of this phrase is unambiguous and direct:[8] "hot cargo" clauses are void at their inception and unenforceable by the courts since they cannot create legally cognizable duties.

This Court is well versed in construing the language of statutes that provide that certain contract provisions are "void." In *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11 (1979), the plaintiff shareholder of a real estate investment fund sought an implied right of action to rescind an investment advisers contract under Section 215 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-15 (1976). Section 215 provides that contracts whose formation or performance would violate the Act "shall be void . . . as regards the

---

[7] Mid-America contends that the language of the statute itself is dispositive of the Section 8(e) issue and mandates reversal of the court of appeals. Mid-America notes, however, that Kaiser treats this particular issue more fully in its brief and Mid-America concurs with the positions regarding Section 8(e) presented therein.

[8] There is hardly a more basic principle of statutory construction than that enunciated in Caminetti v. United States, 242 U.S. 470, 485 (1917); "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." In such a case, "the rules which are to aid doubtful meanings need no discussion." *Id.* Repeatedly this Court has relied on this principle and has most recently stated: "'[W]hen we find the terms of a statute unambiguous, judicial inquiry is complete,' unless unusual circumstances are present." United Ass'n of Journeymen v. Local 334, 49 U.S.L.W. 4755, 4759 (1981) (Burger, C.J. dissenting), citing Rubin v. United States, 49 U.S.L.W. 4103, 4104 (1981).

rights of" the violator and knowing successors in interest. This Court held that this statutory language implies a right to relief in federal court:

> [W]e conclude that when Congress declared in § 215 that certain contracts are void, it intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution.

Id. at 18 (footnote omitted).

In reaching its conclusion, the Court emphasized that even if the term "void" were given its narrowest possible reading, Section 215 could be raised defensively in a contract enforcement action:

> By declaring certain contracts void, . . . [a]t the very least Congress must have assumed that § 215 could be raised defensively in private litigation to preclude the enforcement of an investment advisers contract.

Id.[9]

---

[9] In *Transamerica*, this Court reached its conclusion without the aid of legislative history since the history was silent on this point. The legislative history of Section 8(e) is not silent and leaves absolutely no doubt that the authors of Section 8(e) intended what the language literally dictates. Congressman Griffin, the sponsor of the House bill, stated that "[Section 8(e)] not only makes it an unfair labor practice to enter into a 'hot cargo' agreement, but also makes it clear that such contracts are void and unenforcible." National Labor Relations Board, 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 1523 (1959). Similarly, Senator Goldwater described Section 8(e) as rendering "hot cargo" provisions "unenforcible and void *for all purposes*." (Emphasis added.) He further emphasized that "[i]t is unlawful for either party to . . . enter into it . . . or to live up to it even if his refusal to do so is in breach of a voluntary agreement . . . and finally, such breach does not constitute a good cause of action in a suit at law . . . or to secure specific performance of the agreement." *Id.* at 1857.

Such a reading is entirely consistent with Justice Stewart's understanding of the language of Section 8(e) itself:

> Since § 8(e) provides that any prohibited agreement is "unenforcible and void," any union effort to . . . compel the neutral employer to comply with his purely voluntary agreement would obviously be unavailing.

Connell Construction Co. v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 649 n.9 (1975) (Stewart, J. dissenting). No members of the majority in *Connell* questioned Justice Stewart's reading of Section 8(e). In light of the intervening *Transamerica* decision there is no basis for doing so now.

The plain language of Section 8(e) required the court of appeals to acknowledge that "[t]he existence of the statutory directive that 'hot cargo' clauses are 'unenforcible and void' surely *must be taken into account.*" 642 F.2d at 1314. (Emphasis added.) Its method of doing so, however, was merely to suggest that courts, while prohibited from enforcing secondary boycotts contemplated by such illegal provisions, are free to enforce the payment of penalties designed to foster such boycotts:

> In short, by making "hot cargo" clauses "unenforcible and void," Congress intended to prevent unions from compelling through judicial enforcement of collective bargaining agreements the very conduct that the union could not compel by its economic might. Whether Congress meant anything more than that is not apparent from the words it used.

Id. at 1315. This argument collapses under the weight of its own implausibility. The statute makes no distinction between enforcing the boycott and enforcing payments that are designed to implement such boycotts. The court of appeals not only gave its own peculiar gloss

to the statutory language, but it also failed to consider that Kaiser's payment under the purchase-of-coal clause is alleged to be one form of harm from which a "neutral employer" like Kaiser—one who is not the target of the alleged secondary boycott activity—is protected by Section 8(e).[10] If a court order requiring that *A* pay *B* certain sums pursuant to a provision in a contract between them does not constitute enforcement of that contract, we are wholly at a loss to speculate what contract enforcement might be.

The court of appeals' approach to Kaiser's Section 8(e) claim erroneously suggests that a court will not be implicated in the enforcement of "hot cargo" provisions if it ignores their alleged illegality. The courts are simply not at liberty to disregard the plain language of statutes and the manifest effects of their own judgments.

III. ADOPTION OF THE COURT OF APPEALS' DECISION WOULD IMPEDE THE COLLECTIVE BARGAINING PROCESS AND WOULD PROMOTE UNNECESSARY AND DUPLICATIVE LITIGATION.

The most troublesome aspect of the court of appeals' decision is its disruptive impact on national labor policy and judicial administration. If permitted to stand, the decision below would have two dramatically adverse consequences. First, it would foster increased levels of economic upheaval occasioned by collective bargaining impasses and strikes. Second, it would encourage employers to initiate unnecessary litigation to test contract provisions that might otherwise go unenforced.

---

[10] *See* National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 624-35, 645 (1967), where this Court repeatedly noted that the central theme of Section 8(e) is to protect "neutral" employers from being burdened by "hot cargo" clauses which have the effect of placing the "neutral" employers in the middle of the union's dispute with other parties.

A principal goal of national labor relations policy is to create an atmosphere conducive to the establishment of agreements between the parties and the promotion of industrial peace. As stated in Section 101 of the Labor-Management Relations Act, 29 U.S.C. § 151 (1976):

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining . . . .

In a similar vein, this Court has stated that "[o]ne of the primary purposes" of federal labor law "is to promote the peaceful settlement of disputes by subjecting labor-management controversies to the mediatory influence of negotiations." *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 211 (1964). The court of appeals' decision is contrary to this purpose because it would create new and potentially insurmountable problems for employers negotiating collective bargaining agreements that contain provisions of suspect legality.

Courts have recognized that one of the ways of fostering industrial peace is to allow parties to the collective bargaining process to negotiate regarding the inclusion of provisions whose legality may be questioned by one of the parties. For example, in *United Electrical, Radio & Machine Workers of America* v. *NLRB*, 409 F.2d 150 (D.C. Cir. 1969), the employer was charged with failing to bargain in good faith for proposing a novel contract term that the union alleged to be illegal. The court held that insistence on the term in question did not constitute an unfair labor practice, and added:

> Time may prove the Company's legal hypotheses misconceived. . . . All this proves is that legal forecasting like meteorological forecasting, is an inexact science.

> . . . Where either an employer or a union has made a novel proposal which it could reasonably believe would prove enforcible, it would seem neither fair nor desirable to make the duty to bargain in good faith turn on a decision as to the proposal's ultimate enforcibility. Such a test would mean that the parties would have either to avoid innovative proposals, or to be sufficiently clairvoyant to guess the eventual resolution of difficult and open questions of law.

Id. at 159.[11]

In holding that a district court may not entertain illegality defenses in contract enforcement actions, the court of appeals has made the position of the employer in the collective bargaining process decidedly perilous. The risks to the employer of allowing a provision which he believes to be unlawful to be included in the agreement are substantial, as Kaiser can attest. His incentive, therefore, would be strenuously to avoid the inclusion of the legally suspect provision. Thus a contract term of questionable legality would likely become a significant sticking point in contract negotiations. Not only would the bargaining process become protracted and more complicated, but the risk of ultimate impasse and economically damaging strikes would be increased.

---

[11] Cases in which bargaining for an illegal provision to impasse is found to be a violation of the party's duty to bargain in good faith under Sections 8(a)(1) and (5), 8(b)(3) and 8(d) of the LMRA do not address the issue of negotiating for provisions of suspect legality. *See* NLRB v. Amalgamated Lithographers of America (IND.), 309 F.2d 31, 42 (9th Cir. 1962), *cert. denied*, 372 U.S. 943 (1963); NLRB v. International Longshoremen's & Warehousemen's Union, Local No. 13, 549 F.2d 1346, 1354 (9th Cir.), *cert. denied*, 434 U.S. 922 (1977). For a party to be charged with this kind of violation, there must be some prior determination that the clause itself is illegal. Neither Sections 8(a)(1) and (5), 8(b)(3) and 8(d) nor the cases that construe them give any substantive guidance to a negotiating party who is faced with a clause that is not illegal on its face but is of questionable legality.

An employer who was unable to make any headway against the union in negotiations, or who was unwilling to incur the massive costs of impasse and strike, might ultimately decide to sign the collective bargaining agreement, despite its inclusion of the suspect provision. At this point, under the court of appeals' decision, the employer would be transformed into an involuntary plaintiff, for if he did not affirmatively assert the illegality of the provision in question, he would never have an opportunity to raise his claim. This forced litigation could be wasteful and ineffectual.

The perceived necessity of resorting to litigation virtually precludes the possibility that both the employer and the union might refrain from performing and enforcing the suspect provision. Mutual forbearance involves neither litigation nor its associated costs; it has heretofore been regarded as one of the incidents of the freedom of contract. By making the employer's forbearance the equivalent of surrendering his legal position, the court of appeals' decision virtually assures that unnecessary litigation would result.

Another disadvantage of requiring employers to pursue their illegality claims affirmatively or forsake them entirely is strikingly illustrated by the factual context of this case. Where an employer like Kaiser asserted that the contract provision in question violates both the labor laws and some other federal statute, like the Sherman Act, he might have to resort to multiple forums to preserve his rights. Under the court of appeals' decision, for example, Kaiser would have been obliged to raise its Section 8(e) argument before the National Labor Relations Board ("NLRB") and to raise its Sherman Act claims in a federal court suit. Such a result is surely less efficient than raising both claims simultaneously as defenses to a contract enforcement action.

Moreover, even if the employer took the initiative and instituted the necessary proceedings, there is a substantial likelihood, at least in the context of a Section 8(e) claim, that the legality of the provision could not be fully assessed. Section 8(e) prohibits contracts which require one employer to cease doing business with another employer. In enforcing this prohibition, the courts have distinguished between "union standards" clauses which preserve unit work and standards, and "union signatory" clauses which further union goals generally, holding the former to be legal and the latter to be illegal. *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612 (1967). Often, however, this distinction cannot be made on the basis of the language of the contract provision itself, but rather requires reference to the circumstances under which enforcement is sought.[12] Because evidence of the circumstances under which enforcement is sought is not likely to be available at the outset of the contract term when the employer would be forced to institute its challenge, the NLRB or the court would be able to find illegal only a contract provision which on its face has a secondary objective. In the situation where the secondary objective is revealed not on the face of the provision but in the manner and circumstances under which enforcement is sought, the tribunal would be forced to uphold the legality of the terms of the provision but defer decision on the legality of the provision as applied until such time as the union sought enforcement. Such a deferment, of course, would place the parties in the same position in which the Court finds them today.

---

[12] Even a seemingly lawful "work preservation" clause may, in certain circumstances, provide the basis for illegal secondary activity. NLRB v. Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & General Pipefitters, Local Union No. 638, 429 U.S. 507 (1977).

We find it impossible to see how a result that at the very least encourages unnecessary litigation and adds impediments to the collective bargaining process could be in the interests of national labor policy or sound judicial administration. The preservation of the right to raise illegality defenses assures that disputes will be resolved when and if they do arise, by bodies that are competent to resolve them, on terms that are fair to the parties to the contract.

CONCLUSION

The judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

JAMES D. HUTCHINSON
(Counsel of Record)
EDWARD R. LEAHY
SAMUEL M. SIPE, JR.
ILDIKO POGANY DEANGELIS
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2087
Attorneys for Amicus Curiae
Mid-America Legal Foundation

Of Counsel:
JOHN M. CANNON
SUSAN W. WANAT
20 North Wacker Drive
Suite 2245
Chicago, Illinois 60606
(312) 263-5163

July 8, 1981

Office-Supreme Court, U.S.
FILED
AUG 25 1981
ALEXANDER L. STEVAS,

No. 80-1345

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

KAISER STEEL CORPORATION,
Petitioner,
v.
JULIUS MULLINS, *et al.*,
Respondents.

BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF RESPONDENTS

GERALD M. FEDER*
DENIS F. GORDON
NIK B. EDES
P. JOSEPH WALSHE
TIMOTHY ST.C. SMITH
FEDER & GORDON
1527 - 18th Street, N.W.
Washington, D.C. 20036
(202) 387-1515
Attorneys for Amicus Curiae National Coordinating Committee For Multiemployer Plans
*(Counsel of Record)

Of Counsel:
FEDER & GORDON
1527 - 18th Street, N.W.
Washington, D.C. 20036
(202) 387-1515

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

CONNERTON & BERNSTEIN
1899 L Street, N.W.
Washington, D.C. 20036
(202) 466-6790

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. JOINT TRUSTEES OF COLLECTIVELY BARGAINED EMPLOYEE PENSION AND WELFARE FUNDS ARE PROHIBITED FROM ACTING AS ADVOCATES ON BEHALF OF THE PARTISAN INTERESTS OF THE UNION OR THE EMPLOYER	6
II. LITIGATION OF KAISER'S ILLEGALITY DEFENSES WOULD REQUIRE FUND TRUSTEES TO ADVOCATE PARTISAN POSITIONS IN UNION-EMPLOYER COLLECTIVE BARGAINING DISPUTES	8
A. Trial of the Sherman Act Allegations Would Require Trustees To Defend Union Collective Bargaining Interests	8
B. Trial of The Unfair Labor Practice Allegations Would Require Trustees to Defend Union Collective Bargaining Interests	10
III. THE STATUTORY MANDATE THAT FUNDS REMAIN NEUTRAL AND OPERATE FOR THE EXCLUSIVE BENEFIT OF PARTICIPANTS AND BENEFICIARIES WOULD BE MATERIALLY COMPROMISED IF TRUSTEES WERE REQUIRED TO RESPOND AS OPPONENTS TO THE ILLEGALITY DEFENSES	12

TABLE OF CONTENTS—Continued

Page

A. The Law Strictly Obligates Fund Trustees To Act And To Expend Fund Assets In The Sole And Exclusive Interests Of Participants And Beneficiaries 12

B. Effective Implementation Of Applicable Statutes And Of Prior Decisions Of The Courts Require That An Absolute Rule Be Adopted Which Insulates Fund Trustees From Having To Abdicate Their Neutral Role 17

CONCLUSION 25

TABLE OF AUTHORITIES

Cases: Page

Amax Coal Company v. *N.L.R.B.*, 614 F.2d 872 (3rd Cir. 1980), rev'd —— U.S. ——, 49 U.S.L.W. 4880 (June 29, 1981) 11
Arroyo v. *United States*, 359 U.S. 419 (1959) 12, 13
Contractors, Laborers, Teamsters, and Engineers Health and Welfare Plan v. *Associated Wrecking Co.*, 484 F. Supp. 582 (D. Neb. 1980), rev'd, 638 F.2d 1128 (8th Cir. 1981) 22
Daniel v. *International Brotherhood of Teamsters*, 439 U.S. 551 (1979) 2
Duplex Company v. *Deering*, 254 U.S. 443 (1921) .. 9
Huge v. *Long's Hauling Co., Inc.*, 590 F.2d 457 (3rd Cir. 1978), *cert. denied*, 442 U.S. 918 (1979) 21, 24
Huge v. *Old Home Manor, Inc.*, 419 F. Supp. 1019 (W.D. Pa. 1976) 17
Lewis v. *Benedict Coal Corporation*, 361 U.S. 459 (1960) 3, 18, 19, 20, 23
Local 189, Meat Cutters Union v. *Jewel Tea Company*, 381 U.S. 676 (1965) 9
N.L.R.B. v. *Amax Coal Co.*, —— U.S. ——, 49 U.S.L.W. 4880 (June 29, 1981) 2, 3, 4, 5, 14, 15, 16
National Woodwork Manufacturers Association v. *N.L.R.B.*, 386 U.S. 612 (1967) 10, 11
Pennington v. *United Mine Workers*, 325 F.2d 804 (6th Cir. 1963), rev'd, 381 U.S. 657 (1965) 21
Rosen v. *Hotel and Restaurant Pension Fund*, —— F.2d ——, 2 E.B.C. 1054 (3rd Cir. 1981) .. 17
United Mine Workers v. *Pennington*, 381 U.S. 657 (1965) 8, 20, 21
Washington Area Carpenters' Welfare Fund v. *Overhead Door Co. of Metropolitan Washington*, 488 F. Supp. 836 (D.D.C. 1980) 22
Waggoner v. *Northwest Excavating, Inc.*, —— F.2d ——, 2 EBC 1356 (9th Cir. 1981) 21
Waggoner v. *R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1981) 21

TABLE OF AUTHORITIES—Continued

Page

Western Washington Laborers-Employers Health and Security Trust Fund v. *McDowell*, —— F. Supp. ——, 103 LRRM 2219 (W.D. Wash. 1979) 22

Statutes:

Employee Retirement Income Security Act of 1974:
Section 2, *et seq.*, 29 U.S.C. §§ 1001, *et seq.*..... 1
Section 302, 29 U.S.C. § 1082 16
Sections 401-409, 29 U.S.C. §§ 1101-1109 3
Section 403(c)(1), 29 U.S.C. § 1103(c)(1).... 14
Section 404(a), 29 U.S.C. § 1104(a) 13, 17
Section 406(b)(2), 29 U.S.C. § 1106(b)(2).. 13-14
Section 409(c), 29 U.S.C. § 1109(c) 14

Internal Revenue Code of 1954, as amended:
Section 401(a)(2) 13
Section 404(a) 13

Labor Management Relations Act of 1947:
Section 302(c)(5), 29 U.S.C. § 186(c)(5) 2, 5, 6, 12, 13, 14, 15, 17, 18, 23
Section 301(b), 29 U.S.C. § 185(b) 19

Multiemployer Pension Plan Amendments Act of 1980, Public Law 96-364, 94 Stat. 1208-1311 (1980):
Section 306(a), 29 U.S.C. § 1145 (1981) 16, 22
Section 306(b), 29 U.S.C. 1132(g) (1981).... 25

National Labor Relations Act:
Section 8(e), 29 U.S.C. § 158(e) 7, 10
Section 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B) 15
Section 8(f), 29 U.S.C. 158(f) 22

Sherman Antitrust Act:
Sections 1 & 2, 15 U.S.C. §§ 1, 2 ..... 7, 20

TABLE OF AUTHORITIES—Continued

	Page
Legislative Materials:	
S. Rep. No. 93-383, 93rd Cong., 1st Sess. (1973)	14
H.R. Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess. (1974)	14
93 Cong. Rec. 4876-77 (1947)	13
126 Cong. Rec. S9835 (daily ed., July 24, 1980)	2
126 Cong. Rec. S10100 (daily ed., July 29, 1980)	2
126 Cong. Rec. S11673 (daily ed., August 26, 1980)	23
Miscellaneous:	
St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 Va. L. Rev. 603 (1976)	8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1345

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS, *et al.*,
Respondents.

BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF RESPONDENTS

The National Coordinating Committee for Multiemployer Plans submits this brief *amicus curiae* in support of Respondents. Copies of letters written by counsel for Petitioner and Respondents, granting the parties' consent to this submission, are on file with the Clerk of the Court.

INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The National Coordinating Committee for Multiemployer Plans ("NCCMP") is a non-profit, tax-exempt organization established after Congress enacted the Employee Retirement Income Security Act of 1974.[1] NCCMP consists of representatives of approximately one hundred

[1] 29 U.S.C. § 1001, *et seq.*, hereinafter referred to as "ERISA".

thirty-five pension and welfare plans, or their sponsors, through which, in the aggregate, the interests of approximately three million persons are represented. On behalf of its affiliated multiemployer plans and their participants and beneficiaries, the NCCMP is actively engaged in monitoring the development—legislative, administrative, and judicial—of the laws which relate to the structuring and administration of multiemployer pension and welfare plans. Because of the broad range of experience represented among its constituent organizations, the NCCMP believes that it is well qualified to inform appropriate governmental authorities regarding the problems facing the sponsors, trustees and administrators of multiemployer plans.[2]

The NCCMP is concerned that, if adopted by this Court, the position advocated in the courts below by Petitioner Kaiser Steel Corporation ("Kaiser") would necessarily and inevitably result in a significant erosion of carefully designed, time-tested safeguards of pension and welfare funds' neutrality in labor-management disputes. As recently noted by this Court in *National Labor Relations Board* v. *Amax Coal Co.*, —— U.S. ——, 49 U.S.L.W. 4880 (1981), Congress took great care in enacting section 302(c)(5) of the Labor-Management Relations Act of 1947 (hereinafter "LMRA")[3] to insure that moneys contributed to collectively bargained, jointly-trusteed pension and welfare trust funds would be used *solely* to provide benefits to participants and their beneficiaries, and to foreclose the possibility that such funds

[2] The NCCMP has been recognized as having had a "significant impact" on the development of the Multiemployer Pension Plan Amendments Act of 1980, Public Law 96-364, 94 Stat. 1208-1311 (1980) by the Senate co-sponsors of that legislation. See 126 Cong. Rec. S 9835 (daily ed., July 24, 1980); 126 Cong. Rec. S 10100 (daily ed., July 29, 1980). The NCCMP also appeared before this Court as an *amicus curiae* in *Daniel* v. *International Brotherhood of Teamsters*, 439 U.S. 551 (1979).

[3] 29 U.S.C. § 186(c)(5).

could themselves become instruments for the advancement of the partisan interests of either unions or employers. In enacting the ERISA fiduciary responsibility requirements in 1974,[4] Congress reaffirmed its earlier intentions and reinforced the insulation of pension and welfare funds from employer and union interests. *Amax Coal Co., supra*, 49 U.S.L.W. at 4883.

Contrary to that legally mandated neutrality of pension and welfare funds, Kaiser seeks to force upon Respondents[5] the role of surrogate to the United Mine Workers of America (the "Union") and, thereby, compel the Trustees to commit the resources of the Funds to a full-scale defense of the Union in what we believe is plainly a prototypical union-employer fight. The NCCMP believes that the result Kaiser seeks would impose substantial burdens on many jointly-trusteed funds, and would seriously interfere with the ability of those funds and their trustees to fulfill their legitimate, legally-mandated responsibilities to the funds' participants and beneficiaries.

The NCCMP is further concerned that adoption of the position advanced by Kaiser would require repudiation of the long-standing rule of federal labor relations law that employee pension and welfare funds enjoy a special third-party beneficiary status which precludes employers from asserting against such funds legal claims and defenses concerning or arising out of their relationships with the unions co-sponsoring the funds. That rule, first recognized by this Court in *Lewis* v. *Benedict Coal Co.*, 361 U.S. 459 (1960), was recently reaffirmed and codified by the Congress in the Multiemployer Pension Plan Amendments Act of 1980, Public Law 96-364, 94 Stat. 1208-1311 (1980) (hereinafter referred to as

---

[4] 29 U.S.C. §§ 1101-1109.

[5] Respondents are the Trustees of the United Mine Workers of America Health and Retirement Funds.

"MPPAA"). The legislative history of the MPPAA clearly demonstrates that Congress considered it critical to the purpose of that legislation[6] and to "sound national pension policy" that employers not be permitted to convert simple collection cases brought by fund trustees into lengthy, complex and costly litigation involving claims and defenses solely related to the union-employer relationship. It is to elaborate these concerns and to place them before the Court that the NCCMP sought permission to file this brief.

SUMMARY OF ARGUMENT

Petitioner Kaiser Steel Corporation asks this Court to fashion a rule which would permit employers to ignore contractual commitments to contribute to jointly-trusteed employee pension and welfare funds, and to require that the funds' joint trustees assume responsibility for defending and advocating various collective bargaining interests of the union in litigation in order to establish the funds' entitlement to the contributions the employer had agreed to make. Such a rule is necessary, says Kaiser, in order to avoid enlisting the power and authority of the courts in the enforcement of "illegal" contracts, and is prevented neither by generally accepted principles of contract and antitrust law, nor by the doctrines of preemption and primary jurisdiction developed under the National Labor Relations Act.

Both courts below refused to permit Kaiser to interpose the defenses of illegality which it sought to raise against the Respondent Trustees. In seeking reversal of those rulings here, Kaiser invites the Court to view the

---

[6] As noted by this Court in *National Labor Relations Board* v. *Amax Coal Co., supra*, 49 U.S.L.W. at 4885, n. 22, Congress sought, by enacting the MPPAA, to "enhance the financial stability of multiemployer pension plans" and "to foster the maintenance and growth" of such plans.

Trustees, who brought the suit, and the United Mine Workers of America, the union cosponsor of the trust, as if they were identical.

To accept Kaiser's hypothesis, however, would require the Court to disregard the nearly thirty-five years during which unions and employers have worked, pursuant to the clear mandate of § 302(c)(5) of the LMRA, to structure and operate jointly-trusteed employee welfare funds so that they would remain strictly neutral in the day-to-day, year-to-year give and take of labor relations. It was Congress' firm judgment in 1947 that such funds must be removed from the field of "industrial combat". That Congressional judgment has never changed, and has on several occasions been reaffirmed. This Court has had occasion as recently as last term to acknowledge and affirm the importance, in the overall scheme of federal labor relations law, of recognizing and maintaining that neutrality. *Amax Coal Company, supra.*

The NCCMP believes that proper recognition of the particular role assigned by Congress to funds like Respondents' is the central principle controlling disposition of this case. To obscure or ignore that neutral role, as Kaiser urges the Court to do, will have the inevitable effect of eroding it. Kaiser proposes to force jointly-trusteed employee welfare funds vigorously to join issue, on behalf of unions and against employers, on a wide range of labor-management collective bargaining disputes. This radical reversal of such funds' carefully-crafted, tightly-constrained neutrality is clearly contrary to the unmistakable intent of Congress. Moreover, this drastic change finds no support in any court decision, and is, in any event, wholly unnecessary to accommodate any legitimate competing or countervailing employer interest. The position urged by Kaiser must be squarely rejected, and the decision of the Court of Appeals affirmed.

ARGUMENT

I. JOINT TRUSTEES OF COLLECTIVELY BARGAINED EMPLOYEE PENSION AND WELFARE FUNDS ARE PROHIBITED FROM ACTING AS ADVOCATES ON BEHALF OF THE PARTISAN INTERESTS OF THE UNION OR THE EMPLOYER.

This litigation began in the District Court for the District of Columbia as a simple collection case. Plaintiffs (Respondents here) are the three Trustees [7] who together are responsible for the administration of the United Mine Workers of America Health and Retirement Funds ("the Funds"). They sought a judgment against the Kaiser Steel Corporation for the difference between the amount of money which Kaiser had agreed to contribute to the Funds during the term of the 1974 National Bituminous Coal Wage Agreement ("NBCWA"), and the amount Kaiser had, in fact, paid during that time. Kaiser's delinquency represented royalties it had agreed to pay on coal purchased from other coal producers for its own use or for resale.

In its defense against the Trustees' claim, Kaiser did *not* deny that it was a party to the 1974 NBCWA, or that the Agreement contained the contribution requirements upon which the Trustees sued. Nor did Kaiser claim that it had not received the miners' labor for which it bargained in the 1974 Agreement, or that it had not purchased the coal for which the Trustees sought to collect royalty payments. Instead, recognizing that it had

---

[7] The Union and the Employers' Association each designate one trustee, and those two select the third. This trustee structure thus precisely complies with the requirement of § 302(c)(5)(B) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5)(B), that "employees and employers [be] equally represented in the administration of such fund, together with such neutral persons as the representatives . . . may agree upon . . . ."

no straightforward defense to the Trustees' delinquency collection action, Kaiser alleged that its contractual obligation to make royalty payments to the Funds for purchased coal could not be enforced *by the Funds* because, in negotiating the purchase-of-coal clause in the 1974 NBCWA, the *Union* had violated Sections 1 and 2 of the Sherman Antitrust Act [8] and Section 8(e) of the National Labor Relations Act.[9]

Both courts below held that Kaiser was not entitled to interpose those defenses in this action by the Trustees. If this Court disagrees, however, the Trustees' right to recover Kaiser's delinquent purchased coal royalties will become contingent upon their ability to prove that no actionable violation of either the Sherman Act or the National Labor Relations Act arises as a result of the Union's negotiation of the purchase-of-coal royalty payment clause. That effort, in turn, will inevitably require the Trustees to engage in vigorous advocacy of the Union's right under the antitrust and labor laws to conduct its collective bargaining relationship with employers as it sees fit.

The intimate, partisan involvement by Trustees in this adversary attempt to sort out the relationship between the UMWA and the employers would, in the view of the NCCMP, be directly antithetical to Congressional mandates of strict neutrality and singleness of purpose under which all such trustees must operate. For these reasons, no defenses such as Kaiser sought to raise below should be permitted in trustee actions to collect delinquent employer contributions.

---

[8] 15 U.S.C. §§ 1, 2.

[9] 29 U.S.C. § 158(e).

II. LITIGATION OF KAISER'S ILLEGALITY DEFENSE WOULD REQUIRE FUND TRUSTEES TO ADVOCATE PARTISAN POSITIONS IN UNION-EMPLOYER COLLECTIVE BARGAINING DISPUTES.

A. Trial of the Sherman Act Allegations Would Require Trustees To Defend Union Collective Bargaining Interests.

The task of harmonizing the facially contradictory mandates of the Sherman Act's prohibition against combinations which restrain trade, and the National Labor Relations Act's specific authorization and protection of concerted collective bargaining activity has been and continues to be both difficult and complicated.[10] The nature of the issues presented in any such case, moreover, makes it inevitable that, should pension or welfare fund trustees find themselves forced to litigate these issues, they will be compelled in doing so to assume the role of advocate for the involved union. The history of antitrust litigation in the coal mining industry itself makes it abundantly clear that challenges such as Kaiser attempts to raise here are merely the most recent manifestations of a years-long battle between the United Mine Workers and employers in that industry.[11] When that battle has previously resulted in litigation in which a term of a collective bargaining agreement has been challenged as violative of the Sherman Act, defense of the challenged clause has invariably required defense of the union's effort to enlarge upon or expand the limits of permissible collective bargaining. *See United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). Thus the task falling to a

---

[10] See generally St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 Va. L. Rev. 603 (1976).

[11] Kaiser itself characterizes this case as one arising "out of a coal industry labor dispute that is decades old[,]" (Pet. Brief, p. 3), and which has "led to almost continuous litigation before the federal courts and the National Labor Relations Board. . . ." (Pet. Brief, p. 5).

party charged with defending a collective bargaining agreement against a Sherman Act challenge is to demonstrate that the disputed provision

> is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's length bargaining in pursuit of their own labor union policies and not at the behest or in combination with nonlabor groups, [that it] falls within the protection of the national labor policy and is therefore exempt from the Sherman Act (footnote omitted).

Local 189, Meat Cutters Union v. *Jewel Tea Company*, 381 U.S. 676, 689-690 (1965) (Opinion of White, J.). Any litigation of such a challenge necessarily requires an exploration of the context in which the disputed clause was proposed and agreed upon, and will frequently require inquiry concerning, and determination of, the union's objectives in seeking the clause.[12] Such controveries are, in the words of Justice Brandeis, extensions of the ongoing process in which "industrial combatants . . . push their struggle to the limits of the justification of self-interest. . . ." *Duplex Company* v. *Deering*, 254 U.S. 443, 488 (1921) (Brandeis, J., dissenting). It is, no doubt, wholly appropriate that, when challenged in court, the "industrial combatants" be required to defend the bargaining choices they have made and the negotiating tactics they have employed. However, unlike Kaiser, we think it is entirely inappropriate and clearly contrary to equally important, equally well defined public policy considerations to require that neutral pension fund trustees take up the partisan cause of one of the "combatants" in this process.

---

[12] "[U]nder established precedents, the antitrust laws exempt agreements, whether primary or secondary, that are aimed at promoting union organization, as well as agreements that are aimed at eliminating competition over labor standards." St. Antoine, *supra*, 62 Va. L. Rev. at 622.

B. Trial Of the Unfair Labor Practice Allegations Would Require Trustees To Defend Union Collective Bargaining Interests.

Trial of Kaiser's defensive claim that the union committed a violation of Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) by negotiating the 1974 "purchase-of-coal" clause would also require the Fund to defend the union's collective bargaining interest.

Like the litigation of Sherman Act allegations in the collective bargaining context, the task of measuring the challenged purchase-of-coal clause to determine whether it does or does not run afoul of the § 8(e) prohibition against "hot cargo" clauses would be a complex and difficult one. Moreover, in the context of a highly charged union-employer dispute like the one from which this controversy arises, that determination

> cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for [Kaiser's] employees, or whether the [purchase-of-coal clause was] tactically calculated to satisfy union objectives elsewhere. . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees. This will not always be a simple test to apply. (footnotes omitted.)

National Woodwork Manufacturers Association v. *N.L.R.B.*, 386 U.S. 612 at 644-645 (1967).[13] Thus, were Kaiser to prevail here, fund trustees who undertake, as Respondents did in this case, to collect delinquent contributions owed by contributing employers, would thereafter

---

[13] That the test "will not always be . . . simple" is evidenced by the fact that *Woodwork Manufacturing Ass'n, supra*, produced one concurring opinion and a dissent in which four Justices joined.

be forced to defend a wide variety of union negotiating and organizing tactics. Presentation of those defenses would inevitably require inquiry into such areas as "the history of labor relations between the union and the employers . . . , and the economic personality of the industry." [14] Upon the strength and vigor of the trustees' presentation in such cases would turn determination of whether the challenged clause unlawfully pressured

> neutral employers and their employees, not involved in a labor dispute, . . . to assist a union in a dispute with another employer.

Amax Coal Company v. *N.L.R.B.*, 614 F.2d 872, 886 (3d Cir. 1980), rev'd on other grounds —— U.S. ——, 49 U.S.L.W. 4880 (June 29, 1981). It is precisely upon such determinations that the boundaries between permissible organizing and negotiating tactics and impermissible secondary activity are drawn. Thus, litigation of such questions clearly constitutes an extension of the collective bargaining process in which the parties to that process are able to test the validity and enforceability of positions they have adopted, and tactics they have employed, in direct dealings with one another.[15] In sum, we believe it self-evident that litigation of issues like those Kaiser attempted to raise in this case becomes every bit as much a part of the "industrial combat" between unions and employers as are the direct organizing and negotiating activity from which the litigation arises. The Trustees are not a cohort in the army of either the union or the employer and should not be dispatched to engage in the battle.

---

[14] *Woodwork Mfrs. Ass'n, supra*, 386 U.S. at 645, n. 38.

[15] That the parties to the 1974 NBCWA recognized that their dispute over the "purchase-of-coal" clause was but one element of their collective bargaining relationship is clear. They specifically contemplated, in Article XX of that Agreement, the possibility that that dispute might produce both litigation between them and further negotiations.

III. THE STATUTORY MANDATE THAT FUNDS REMAIN NEUTRAL AND OPERATE FOR THE EXCLUSIVE BENEFIT OF PARTICIPANTS AND BENEFICIARIES WOULD BE MATERIALLY COMPROMISED IF TRUSTEES WERE REQUIRED TO RESPOND AS OPPONENTS TO THE ILLEGALITY DEFENSES.

A. The Law Strictly Obligates Fund Trustees To Act And To Expend Fund Assets In The Sole And Exclusive Interests Of Participants And Beneficiaries.

Beginning with enactment of § 302 of the LMRA, and continuing with enactment of ERISA and the MPPAA, Congress has carefully and consistently required that trustees of employee benefit plans act solely in the interests of plan participants and beneficiaries. In adopting the requirements and limitations specified in § 302(c)(5), Congress intended

> to deal with problems peculiar to collective bargaining. The provision was enacted as part of a comprehensive revision of federal labor policy . . . , and aimed at practices which Congress considered inimical to the integrity of the collective bargaining process.

Arroyo v. *United States*, 359 U.S. 419, 424-425 (1959). The solution fashioned by Congress "to deal with [these] peculiar . . . collective bargaining" problems was to permit employers to make payments to pension and welfare funds *only* if such funds were

(a) held in trust,

(b) administered by trustee boards on which unions and employers were equally represented,

(c) administered only in accordance with detailed written plans of benefits and contributions, and

> (d) administered "for the sole and exclusive benefit of employees . . . and their families and dependents . . ."

29 U.S.C. § 186(c)(5).[16] The language of § 302(c)(5) is thus carefully tailored to asure that employee trust funds could not be used in any way to influence or interfere with the process of collective bargaining; such funds could

> be established only for purposes which Congress considered proper and expended only for the purposes for which they were established.

Arroyo, supra, at 426.

Comprehensive Congressional revisitation in 1974 and 1980 of problems associated with operation of collectively bargained, jointly-trusteed pension funds leaves no room for doubt that Congress continues to adhere to its 1947 judgment that absolute removal of the operation of employee benefit trust funds from the collective bargaining arena was necessary. The comprehensive pension legislation adopted in 1974 not only continued, but substantially elaborated the fund and trustee constraints originally adopted in 1947. Thus, for example, Section 404(a) of ERISA requires that fund trustees, as fiduciaries, act solely in the interests of plan participants and beneficiaries,[17] while Section

---

[16] Similarly, Section 401(a)(2) of the Internal Revenue Code of 1954 (IRC) requires that a trust fund must be used for no other purpose than the exclusive benefit of employees and their beneficiaries. Failure to meet such requirement can result in disqualification of a plan and disallowance of employer deductions for contributions. *See*, IRC section 404(a).

[17] 29 U.S.C. § 1104(a). The obligation to operate these funds for the "sole and exclusive benefit" of employees clearly prohibits the use of fund assets for or in the interest of either unions or employers. *See*, e.g., 93 Cong. Rec. 4876-77 (1947): "[U]nless we impose some restrictions we shall find that the . . . fund will become . . . a war chest for the . . . union . . ." (Remarks of Sen. Taft),

406(b)(2)[18] prohibits them from representing any interest adverse to that of the plan beneficiaries. Section 409(c)[19] provides that trustee breaches of their fiduciary obligations may result in assessment of personal liability against them.

The legislative history of ERISA confirms, moreover, that Congress specifically intended to prohibit fund trustees "from engaging in actions where there would be a conflict of interest with the fund, such as representing any party dealing with the fund." S. Rep. No. 93-383, 93d Cong., 1st Sess., pp. 31-32 (1973), and "from being put into a position where he has dual loyalties and therefore cannot act exclusively for the benefit of a plan's participants and beneficiaries." H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., p. 309 (1974). The only way, of course, to assure the required neutrality, and to insure that trustees will, in fact, act solely in the interests of participants and beneficiaries, is completely to remove such funds from the competing pressures and demands necessarily generated by the collective bargaining process.

As this Court has unequivocally confirmed, that is precisely what Congress has done. In *NLRB* v. *Amax Coal Co., supra*, the Court was called upon closely to examine the permissible limits of the role of trustees of a § 302(c)(5) trust fund vis-a-vis the collective bargaining parties who sponsor the fund. The central issue in *Amax* was whether the employer-selected trustees of a Taft-Hartley trust fund are "representatives of the employer for purposes of collective bargaining or adjustment of grievances" within the meaning of § 8(b)(1)

---

and section 403(c)(1) of ERISA; "[T]he assets of a plan shall never inure to the benefit of any employer . . . ." *Cf. Amax Coal Co., supra*, 49 U.S.L.W. at 4883, (1981).

[18] 29 U.S.C. § 1106(b)(2).

[19] 29 U.S.C. § 1109(c).

(B) of the National Labor Relations Act.[20] Addressing that issue, the Court found, on the basis of a comprehensive and detailed examination of the history and intent of § 302(c)(5) and ERISA, that the

> duties of an employer-appointed trustee of an employee benefit trust fund, under § 302(c)(5) of the Act, under principles long ago developed by the courts of chancery, and under specific provisions of ERISA, are totally alien to both [collective bargaining and adjustment of grievances].

Amax Coal Co., supra, 49 U.S.L.W. at 4885. The Court's examination of that controlling statutory framework compelled it to conclude instead

> that an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interests of the party that appointed him . . .

Id., 49 U.S.L.W. at 4884.

> The management-appointed and union-appointed trustees do not bargain with each other to set the terms of the employer-employee contract; they can neither require employer contributions not required by the original collectively-bargained contract, nor compromise the claims of the union or the employer with regard to the latter's contributions.

Id.

Thus, in this Court's view, Congress has drawn clear, unmistakable distinctions between legitimate union-employer collective bargaining and trust fund administration. Whereas in collective bargaining each side is free within broad limits to negotiate, compromise, and ex-

---

[20] Section 8(b)(1)(B) makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances. . . ." 29 U.S.C. § 158(b)(1)(B).

ert economic pressure on the other, none of those activities may properly play a role in the operation of employee benefit trusts. Particularly pertinent here is the Court's recognition that prominent among the statutory responsibilities of fund trustees is the responsibility to insure, through whatever means are necessary, that employer contributions owed to the fund are paid.

> Indeed, the trustees have an obligation to *enforce* the terms of the collective bargaining agreement regarding employee fund contributions against the employer "for the sole benefit of the beneficiaries of the fund." *United States* v. *Carter*, 353 U.S. 210, 220.

Amax Coal Co., supra, 49 U.S.L.W. at 4884. Trustees' ability to assure prompt and complete employer payment of all contributions owed is, of course, critical to maintenance of the funds' compliance with statutory minimum funding standards.[21] The Court in *Amax Coal Co., supra*, pointed out that one of Congress' principal purposes in adopting the 1980 MPPAA was

> to strengthen the funding requirements and enhance the financial stability of multiemployer pension plans[,]

Amax Coal, supra, 49 U.S.L.W. at 4885, n.22. by *inter alia*, assuring that fund trustees will have the ability to recover delinquent pension contributions quickly and effectively.[22]

As the Court noted in *Amax Coal*, moreover, trustees have no real choice in this matter. Any failure on the part of fund trustees diligently to pursue their obliga-

---

[21] See § 302 of ERISA, 29 U.S.C. § 1082.

[22] See § 306(a) of the MPPAA, making any employer failure to pay contractually required pension contributions a violation of ERISA.

tion to collect delinquent contributions can constitute a breach of their statutory fiduciary obligation,[23] as well as an unlawful extension of credit to the delinquent employer.[24]

It is, in sum, abundantly clear that fund trustees may not engage in any of the adversary activity which characterizes collective bargaining without breaching the well defined Congressional mandates and constraints within which these funds, and their trustees, must operate.

B. Effective Implementation of Applicable Statutes and of Prior Decisions of the Courts Requires That An Absolute Rule Be Adopted Which Insulates Fund Trustees From Having To Abdicate Their Neutral Role.

As we have shown, *supra*, pp. 8-11, if Kaiser were to prevail here, Respondents and other trustees who, like them, administer § 302(c)(5) trusts, would inevitably be obliged to participate in substantive litigation which is for all practical purposes an extension of collective bargaining. It is equally clear, moreover, that such an eventuality would put § 302(c)(5) trustees in fundamental conflict with the constraints which Congress has fashioned for jointly-trusteed employee benefit trusts. The NCCMP believes that appropriate protection of those Congressional constraints, and of the particular role assigned to jointly-trusteed pension funds in the

---

[23] See 29 U.S.C. § 1104(a).

[24] See, e.g., *Huge* v. *Old Home Manor, Inc.*, 419 F.Supp. 1019 (W.D. Pa. 1976); and *Rosen* v. *Hotel and Restaurant Pension Fund*, —— F.2d ——, 2 E.B.C. 1054 (3rd Cir. 1981). The suggestions of Kaiser (Brief at p. 27) and amicus Mid-America Legal Foundation (Brief, pp. 13-17) that adoption of Kaiser's position will enable collective bargaining parties to avoid unnecessary litigation in the future betrays, at best, a fundamental lack of comprehension of the requirements and constraints the law imposes upon fund trustees.

overall scheme of federal labor relations, requires that this Court unequivocally reject the position urged here by Kaiser.

The function which Congress has assigned to jointly-trusteed employee benefit trusts has long been recognized by this Court. More than twenty years ago, the Court found that certain modifications in the otherwise applicable common law principles of contract and agency were necessary regarding § 302(c)(5) trusts if such trusts were fully to effectuate the purposes for which they are created. In *Lewis* v. *Benedict Coal Corporation*, *supra*, the Court was confronted with an employer's claim that the employer was entitled to reduce the amount of its contractual liability to the jointly-trusteed pension and welfare funds in which it participated, on account of damages it had allegedly sustained as a result of union conduct claimed to be unlawful. In substance, the employer's theory in *Benedict Coal*, like Kaiser's theory here, was that the union and the fund were merely each other's *alter ego*, and that the employer's liabilities to, and claims against, each were fungible.

The Court disagreed. Formulating the principles which we believe are controlling here, the Court reasoned that a collective bargaining agreement providing for the establishment of a § 302(c)(5) trust

> is not a typical third party beneficiary contract. The promisor's interest in the third party . . . goes far beyond the mere performance of its promise to that third party, i.e., beyond the payment of royalty. It is a common place of modern industrial relations for employers to provide security for employees and their families to enable them to meet problems arising from unemployment, illness, old age or death. . . . Not only has Benedict entered into a long term relationship with the union [in the creation of a jointly-sponsored welfare fund], but in compliance

> with § 302(c)(5)(B) *it has assumed equal responsibility with the union for the management of the fund.* (emphasis added.)

Id., 361 U.S. at 468. The Court observed further that the contributions any employer agrees to pay to such a fund are fully as much a component of his employees' agreed-upon compensation as are the employees' wages. In the Court's view, the employer could neither have recovered directly from the employees any damages allegedly suffered at the hands of the union, nor attempted to recoup those damages by withholding employees' future wages. The Court found no reason to permit assets of the fund, held in trust for the exclusive benefit of the employees, to be any more vulnerable to such a claim than were assets personally held by, *or owed to*, its employees individually.

Kaiser's contrary suggestion notwithstanding, we believe the *Benedict Coal* analysis is directly applicable here. The reasoning which informed the Court's refusal to permit the delinquent employer to take a set-off against the contributions it owed the fund removes any rational basis for permitting Kaiser, or any other delinquent contributing employer, to interpose and litigate its claims of alleged union misconduct in defense of its own failure to pay its agreed-upon fund contributions. For since fund assets are, in truth, assets of the employees, which must be held by the trustees for the employees' sole and exclusive benefit, those assets may *never* be relied upon to satisfy employer claims against the union.[25] That being so, there is no justification for com-

---

[25] *See* § 301(b) of the LMRA, 29 U.S.C. § 185(b), which provides that a money judgment entered against a union may be enforced *only* against the assets of the union "as an entity". The *Benedict Coal* Court found the policy evidenced by this limitation to apply "with even greater force to protecting the interests of beneficiaries of the welfare fund . . . ." *Benedict Coal Co., supra*, 361 U.S. at 470.

pelling a fund or its trustees to mount a defense of union conduct which the employer claims to be illegal.

The procedural history of both *Benedict Coal*, *supra*, and *Pennington*, *supra*, are, we believe, particularly instructive. Like the case now before the Court, both *Benedict Coal* and *Pennington* began as simple collection cases. In each case, the employer conceded, in response to the trustees' complaint, that the agreement it had executed with the union obligated it to pay contributions to the fund. And in each the employer contended that those obligations were excused by reason of illegal pressures or other unlawful conduct by the union, and because, in *Pennington*, the agreements were allegedly part of an illegal conspiracy in violation of Sections 1 and 2 of the Sherman Act between the union and "certain large coal producers".

Unlike Kaiser Steel, however, the employers in both *Benedict Coal* and *Pennington* impleaded the union in the action and cross-claimed for the damages said to have resulted from the union's misconduct. Unlike Kaiser Steel, therefore, both those employers were required to litigate their damage claims directly against the party whose conduct they alleged to have caused the damage.

The focus of this Court's review in *Benedict Coal*, *supra*, was, as we have noted, whether the trust fund could be held partially liable by way of an employer set-off, for allegedly union-inflicted damage. In *Pennington*, *supra*, however, relying on the trial court's finding of fact that the trustees had not participated in any of the arguably unlawful conduct with which the union had been charged, the Court of Appeals, citing this Court's opinion in *Benedict Coal*, held that neither the Sherman Act violations charged to the union nor the claimed illegality of the contract itself operated to bar the trustees' right to recover the royalty payments defendant

had agreed to make. *Pennington* v. *United Mine Workers*, 325 F.2d 804, 818-819 (6th Cir. 1963), rev'd *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). And whereas the *antitrust* issues in the case, which had been vigorously litigated between the employer and the union—the principal parties to that dispute—were subsequently fully considered by this Court,[26] no further review was sought of the Court of Appeals' refusal to excuse the employer's obligation to contribute to the fund.

It is true that, until recently, the result commanded by *Benedict Coal* has generally prevailed. That is, delinquent contributing employers who have attempted to defend trustee collection actions by showing union illegality have generally been unsuccessful.[27] It is also generally true, however, that reported decisions on this point do not reflect any particular analytical consensus. Instead, the lower courts have generally approached these cases, as Kaiser urges this Court to do, by analyzing Sherman Act illegality claims as antitrust, rather than pension, cases, and unfair labor practice claims as preemption, rather than pension, cases. In our view, that approach fails to account for the special constraints and

---

[26] *United Mine Workers* v. *Pennington*, *supra*, 381 U.S. 657 (1965). Presumably, had Kaiser had a genuine interest in testing the illegality claims raised below it would have followed the employers' leads in *Benedict Coal* and *Pennington* by impleading the union and alleging a Sherman Act cross-claim against it. Kaiser's obvious reluctance to direct such a claim against the only party who can logically be required or expected to defend it illustrates, we believe, that its real motive here is something other than a desire to determine the legal implications of the purchase-of-coal clause.

[27] *See, e.g.*, in addition to the decisions below in this case, *Huye* v. *Long's Hauling Co.*, 590 F.2d 457 (3rd Cir. 1978), *cert. denied*, 442 U.S. 918 (1979); *Waggoner* v. *R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979); *Waggoner* v. *Northwest Excavating, Inc.*, —— F.2d ——, 2 EBC 1356 (9th Cir. 1981).

special responsibilities which characterize jointly-trusteed funds. It carries with it, moreover, not only the danger of improperly involving fund trustees in substantive labor-management litigation, but also the real risk of producing inconsistent results in cases which are conceptually identical.[28]

It was, we suggest, precisely to preclude this possibility, and to assure that fund trustees would be able readily to enlist the aid of the courts in their efforts to collect delinquent employer contributions, that Congress in 1980 enacted § 306 of the MPPAA. As we have noted, *supra*, p. 16 n.22, § 306(a) added a new § 515 to ERISA, 29 U.S.C. § 1145, under which the statute itself is violated by any employer who fails to make the contribution payments he has agreed to make. The purpose of the new § 515 was described by one of the bill's chief sponsors in the Senate in the following terms:

> Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employers' promise and the plans' entitlement to the contributions. This should not be

---

[28] Three district courts have, in fact, permitted employers to plead, and prove, claims of alleged violations of § 8(f) of the NLRA, 29 U.S.C. § 158(f), in successful defense against trustee contribution collection actions. *Washington Area Carpenter's Welfare Fund* v. *Overhead Door Co. of Metropolitan Washington*, 488 F.Supp. 836 (D.D.C. 1980) appeal pending but ordered deferred pending decision of the case at bar by this Court, No. 80-1501, D.C. Cir., June 12, 1981; *Contractors, Laborers, Teamsters, and Engineers Health and Welfare Plan* v. *Associated Wrecking Co.*, 484 F.Supp. 582 (D. Neb. 1980), rev'd. on substantive grounds that absence of the majority status does not preclude enforcement of pre-hire agreement's fringe benefit provisions, but not addressing whether lack of majority support may be raised as a defense by an employer, 638 F.2d 1128 (8th Cir. 1981). Also, *Western Washington Laborers-Employers Health and Security Trust Fund* v. *McDowell*, —— F. Supp. ——, 103 LRRM 2219 (W.D. Wash. 1979), appeal pending No. 80-3024, 9th Cir., Jan. 11, 1980.

> the case. . . . Sound national pension policy demands that employers who enter into agreements for pension contributions not be permitted to repudiate their pension promises.
>
> In this regard we endorse judicial decisions such as *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 549 (1960) . . . and *Huge* v. *Long's Hauling Co., Inc.*, 590 F.2d 457 (3d Cir. 1978). Cases such as *Western Washington Laborers-Employers Health and Security Trust Fund* v. *McDowell*, F. Supp., 103 LRRM 2219 (W.D. Wash. 1979) and *Washington Area Carpenters Welfare Fund* v. *Overhead Door Company*, C.A. No. 79-0097, U.S.D.C.D.C., . . . are considered to have been incorrectly decided.

126 Cong.Rec. S. 11673 (daily ed., August 26, 1980). The Congressional design, reaffirmed by enactment of the MPPAA, could not be clearer: in Congress' considered judgment, national pension policy precludes judicial cognizance in contribution collection suits of employer defenses based upon or arising from the collective bargaining relationship.

Nevertheless, Kaiser now invites the Court to ignore or repudiate the firm command of *Benedict Coal, supra*, and *Amax, supra*, and the unmistakable evidence of Congress' clear intent to insulate fund assets and fund trustees from the battles of collective bargaining. If Kaiser prevails here, not only will employers continue to find it expedient to refuse to pay previously agreed upon fund contributions, but fund trustees, who are obligated by law to sue for delinquent contributions, will be forced to become increasingly involved in the litigation of labor-management disputes.

Because the resultant involvement of the fund directly into the union-employer battle is so fundamentally inconsistent with the Congressional mandate of fund neutrality; because the inevitable expenditure of fund assets in defense of union tactics or conduct cannot be reconciled with the Section 302(c)(5) and ERISA "sole and ex-

clusive benefit" rules; and because the *Benedict Coal* mandate that employers may not look to employee benefit fund assets in satisfaction of any claim arising from union conduct cannot be reconciled with the position Kaiser urges here, we believe, with Circuit Judge Adams, that

> it [is] desireable to have a clear rule that would foreclose such litigation altogether[.]

Huge v. *Long's Hauling Co., Inc.* 590 F.2d 457, 463 (3d Cir. 1978) (Adams, J., concurring), *cert. denied* 442 U.S. 918 (1979).

Adoption of such a rule is, we believe, critical. For only such a holding will preclude employers who agree, as part of a collective bargaining agreement with a union, to make pension or welfare contributions to a trusteed fund from asserting "*any* defenses that [they] may arguably have to that contract[,]" *Long's Hauling Co., supra*; 590 F.2d at 463 (Adams, J., concurring), when the trustees sue to collect those contributions. Only by adopting such a rule, and thus giving full and meaningful effect to the unmistakable Congressional intent evidenced, most recently, in the MPPAA, can this Court assure that fund trustees will no longer be required to fight union-employer fights in order to collect delinquent contributions. Thus, employers will no longer be tempted, as Kaiser Steel was, to hold agreed upon pension contributions hostage to their partisan efforts at improving their own position in representation and collective bargaining relationships with their employees' union.

CONCLUSION

For all the reasons set forth above, the NCCMP respectfully urges the Court to affirm the ruling of the Court of Appeals in this case.[29]

Respectfully submitted,

GERALD M. FEDER*
DENIS F. GORDON
NIK B. EDES
P. JOSEPH WALSHE
TIMOTHY ST.C. SMITH
FEDER & GORDON
1527 - 18th Street, N.W.
Washington, D.C. 20036
(202) 387-1515

Attorneys for Amicus Curiae National Coordinating Committee For Multiemployer Plans

*(Counsel of Record)

Of Counsel:

FEDER & GORDON
1527 - 18th Street, N.W.
Washington, D.C. 20036
(202) 387-1515

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

CONNERTON & BERNSTEIN
1899 L Street, N.W.
Washington, D.C. 20036
(202) 466-6790

August 31, 1981

---

[29] Our failure to address the question designated "3" in Kaiser's petition is not to be construed as supporting the view expressed by Kaiser. To the contrary, we associate ourselves with the position taken by the Respondents with respect to attorneys' fees in this case and, further, believe that the issue was resolved for all such claims when Congress enacted the MPPAA, see § 306(b), P.L. 96-364 amending 29 U.S.C. § 1132(g), making attorneys' fees in successful delinquency actions a statutory right.

Office-Supreme Court, U.S.
FILED
JUL 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION,
Petitioner,

vs.

JULIUS MULLINS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF THE PENNSYLVANIA COAL MINING ASSOCIATION

FOR AMICUS CURIAE THE PENNSYLVANIA COAL MINING ASSOCIATION

STEVEN L. FRIEDMAN
Dilworth, Paxson, Kalish & Levy
2600 The Fidelity Building
Philadelphia, Pennsylvania 19109
(215) 546-3000

JOHN L. KILCULLEN
Kilcullen, Wilson and Kilcullen
Chartered
1800 M Street, N.W.
Washington, D.C. 20036
(202) 296-5700

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1
BOTH THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN FAILING TO CONSIDER THE ON-GOING NATURE OF THE RESTRAINT OF TRADE EFFECTUATED BY THE PURCHASE-OF-COAL CLAUSE 5
ENFORCEMENT OF THE OBLIGATION TO PAY ROYALTIES PURSUANT TO THE PURCHASE-OF-COAL CLAUSE IS INSEPARABLE FROM ENFORCEMENT OF THE RESTRICTIVE SCHEME OF THE CLAUSE ITSELF 7
THE PUBLIC POLICY CONSIDERATIONS CITED BY THE COURT OF APPEALS DO NOT JUSTIFY ENFORCEMENT OF AN ILLEGAL CONTRACT CLAUSE 9
THE FEDERAL COURTS HAVE JURISDICTION TO DECIDE WHETHER A CONTRACT PROVISION VIOLATES SECTION 8(e) OF THE NATIONAL LABOR RELATIONS ACT 11
CONCLUSION 13

TABLE OF AUTHORITIES

Allen Bradley Co. v. *Electrical Workers Union*, 325 U. S. 797 (1945) 10
Connell Co. v. *Plumbers and Steamfitters Local*, 421 U. S. 616 (1975) 10,12
Kelly v. *Kosuga*, 358 U.S. 516 (1969) 5,6,7, 8,9
San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 (1959) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION,

Petitioner,

vs.

JULIUS MULLINS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF THE PENNSYLVANIA COAL MINING ASSOCIATION

INTEREST OF AMICUS CURIAE

The Pennsylvania Coal Mining Association is a voluntary non-profit trade association comprised of 155 bituminous coal producers with mines located throughout the central and western Pennsylvania coal fields. The principal purpose of the Association, which maintains its headquarters at 240 N. Third Street, Harrisburg, Pennsylvania 17120, is to represent the interests of the coal mining industry and to cooperate with public authorities in dealing with problems that affect the industry. The Associ-

ation presents this brief on its own behalf and on behalf of its members. The Association members range in size from small producers mining less than 50,000 tons of coal a year, to larger companies with the capacity to produce in excess of 5 million tons annually. In 1980 the Association membership produced approximately 30 million tons of bituminous coal, out of a total State-wide production of 80 million tons.

The companies comprising the Association's members are not and have not been signatories to the National Bituminous Coal Wage Agreement, and their employees are either non-union or are represented by labor organizations other than the United Mine Workers of America (hereinafter UMWA). Wage and benefit levels maintained by the Association members are at least as favorable as those in mines organized by the UMWA, and in some instances are more favorable. With limited exceptions, health and retirement benefits for their employees are provided through corporate welfare and pension plans or insurance programs funded entirely by employer contributions.

The Association members (hereinafter *amici*) compete in essentially the same market for bituminous coal as the coal companies who are signatories to the National Bituminous Coal Wage Agreement.[1] *Amici* wish to bring to the Court's attention the fact that the purchase-of-coal

[1] The references herein to the National Bituminous Coal Wage Agreement include the successive national agreements entered into between the UMWA and the Bituminous Coal Operators' Association, and, in particular, the 1974 Agreement which is the subject of this litigation. The National Bituminous Coal Wage Agreement of 1978, and the currently effective National Agreement of 1981, contain the same purchase-of-coal clause here involved.

clause of the National Agreement, by imposing a penalty upon coal purchased by a signatory from a non-signatory company, has the effect of creating a substantial restraint of trade in the market for coal in interstate commerce, that by virtue of this clause non-signatory companies are effectively shut off from access to a significant portion of the coal sales market which would otherwise be available to them, and that *amici* as well as other non-signatory producers are made to suffer the consequences of an unreasonable restraint of trade effectuated by a "hot cargo" boycott on the coal they produce.

It is a common occurrence in the coal industry that a producer of coal must purchase coal from another producer in order to meet the specifications of a particular customer for a given grade and quality of coal. Insofar as steam coal is concerned almost all coal supply contracts contain specifications as to sulphur, ash and moisture qualities, as well as the BTU values of the coal to be delivered. Since coal seams vary widely in respect to these qualities a producer often has to blend his coal with coals produced by others to obtain the desired specifications.[2] There is thus an active sales market between coal producers as well as between coal producers and coal users.

Needless to say, cost considerations are significant in every commercial transaction. Hence, if a signatory to the National Bituminous Coal Agreement were to procure coal from a non-signatory producer his cost would be substantially increased by virtue of the added royalty amounts he is required to pay under the purchase-of-coal clause of the Agreement for each such ton of coal he

[2] A similar requirement for blending metallurgical coals of different volatility and coking characteristics is illustrated by Kaiser Steel Company's purchases of coal from Mid Continent Coal and Coke Company. See Kaiser's Petition for Certiorari, p. 4, n. 5.

procures. This cost penalty, which was $1.55 a ton under the 1974 National Agreement, was increased to $1.90 a ton under the 1978 Agreement, and is scheduled to rise to $2.23 a ton under the current 1981 National Agreement, obviously serves as a severe economic deterrent to a signatory's purchase of coal produced by non-signatory companies. In the intensely competitive coal market a cost differential of this magnitude virtually forecloses purchases from non-signatories.

The entire purpose and effect of the purchase-of-coal clause is to put economic pressure on signatory companies to refrain from dealing with non-signatories. As shown by the evidence presented by Kaiser Steel Company, the clause has no other purpose since the payments called for by the clause are not designed, or needed, to meet the funding requirements of the UMWA health and retirement funds to which they are to be made, nor is the amount of the payments related to any assumed differences between UMWA and non-UMWA wage and benefit levels. J. A. 280-81; 296-97.

In short, *amici* are on the receiving end—the victims, as it were—of a classic type of illegal agreement in restraint of trade proscribed by sections 1 and 2 of the Sherman Act, 15 U S C §§ 1 and 2, as well as an illegal hot cargo boycott intended to be outlawed by section 8(e) of the National Labor Relations Act, 29 U S C § 158(e). The refusal of the Court of Appeals and the district court to entertain Kaiser Steel's defense of illegality will, unless reversed, perpetuate this victimization of *amici*, and will also have far-reaching effects upon marketing of bituminous coal in both domestic and foreign markets. For this reason *amici* urge the Court to reverse the decision of the Court of Appeals below.

Consent for the filing of this *Amicus Curiae* brief has been granted by counsel for Petitioner and Respondents.

BOTH THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN FAILING TO CONSIDER THE ON-GOING NATURE OF THE RESTRAINT OF TRADE EFFECTUATED BY THE PURCHASE-OF-COAL CLAUSE

In their suit against Kaiser Steel Company the UMWA Trustees seek to enforce royalty payments claimed to be payable under the purchase-of-coal clause of the 1974 National Bituminous Coal Wage Agreement. In opposing the Trustees' motion for summary judgment Kaiser Steel Company asserted that the clause constitutes an illegal agreement in restraint of trade in violation of the antitrust laws, as well as an unlawful hot cargo clause. The district court ruled that the claim of illegality was not a valid antitrust defense and that the terms of the clause should be enforced "whether or not it fosters illegal ends" under the antitrust laws (App. p. 75a). The court also refused to consider Kaiser's hot cargo defense on grounds that that issue was within the exclusive jurisdiction of the National Labor Relations Board rather than the court.

The court rejected Kaiser's antitrust defense on the basis of its interpretation of *Kelly* v. *Kosuga*, 358 U. S. 516 (1969), finding, *inter alia*, that requiring payments pursuant to the purchase-of-coal clause cannot be said to be enforcing a restraint of trade because the 1974 National Agreement *had expired* prior to the time the suit was brought, and the Kaiser contract for purchase-of-coal was completed. As stated by the court:

> "The contract is at an end—decisions to purchase or not to purchase [non-signatory coal] have been made and acted upon. Whether or not an express or

> implied agreement not to make *future* purchases of coal like the non-delivery agreement referred to in *Kelly* at 521, 79 S. Ct. 429, would warrant a different result, the court concludes that requiring payments pursuant to the purchase-of-coal clause cannot be said to be enforcing a restraint of trade within the meaning of *Kelly* v. *Kosuga.*" App. p. 77a. Emphasis in original.

In affirming the district court's order the Court of Appeals majority (Judge Wilkey dissenting) endorsed this reasoning of the district court, again relying on the analogy with the contract arrangement in *Kelly* v. *Kosuga.*

In comparing the present case with *Kelly* v. *Kosuga* both the district court and the court of appeals majority noted that in *Kelly* it was held that the contract for the sale of onions had been completed at a fair price prior to the purchaser's assertion of a defense of anti-trust illegality, and the illegality claim was not allowed to defeat the seller's claim. A similar rule should be applied in the present case, the district court concluded, because "the Trustees are seeking to recover one component of agreed compensation pursuant to the terms of a contract which has expired." App. 77a.

This analogy is faulty for a number of reasons, the most important being that the effect of the purchase-of-coal clause did not end with the 1974 National Agreement, nor with the coal purchases made by Kaiser Steel. The clause, as previously shown, has been carried forward into the 1978 National Agreement, and the current 1981 Agreement. As noted by the dissenting member of the court of appeals (Judge Wilkey) "Enforcement of this illegal claim in the now expired contract will, of course, have future effects. The same clause is present in the current contract. On the basis of this precedent, all the

trustees have to do respecting the present contract is wait until it expires and automatically collect on it too. By enforcing an illegal contract in this suit the court provides a precedent for enforcement in the future of a contract which Congress has outlawed." App. p. 47a.

Accordingly, the anti-trust restraints and the illegal boycott imposed by this contract clause have by no means come to an end. Unless the Court squarely resolves the issues raised by the Kaiser defenses the clause will continue to interpose severe economic restraints upon sales of coal between the companies signatory to the National Agreement and non-signatory companies.

ENFORCEMENT OF THE OBLIGATION TO PAY ROYALTIES PURSUANT TO THE PURCHASE-OF-COAL CLAUSE IS INSEPARABLE FROM ENFORCEMENT OF THE RESTRICTIVE SCHEME OF THE CLAUSE ITSELF

After refusing to entertain Kaiser's antitrust defense or to receive any evidence or proof on the issues presented, the district court proceeded to hold that the illegality of the purchase-of-coal clause would not present a bar to its enforcement in any event. The Court stated that:

> "The general rule emerging from *Kelly* is that a contract should be enforced whether or not it fosters illegal ends, unless the alleged illegality is of such a character that enforcement of the contract would 'make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act.' " App. p. 75a.

The Court of Appeals concluded that the district court correctly held that Kaiser was not entitled to interpose the illegality defense, and proceeded by implication to treat

the clause as valid. Borrowing language from *Kelly* v. *Kosuga*, the Court of Appeals majority concluded that the purchase-of-coal clause is "an intelligible economic transaction in itself," and thus the defense of antitrust illegality does not lie against it. App. p. 13a. The gist of this argument seems to be that the royalty payments required by the purchase-of-coal clause are part of the compensation benefits for employees covered by the 1974 Agreement, and are separable from the other provisions of the purchase-of-coal clause which impose restraints on purchases of coal. This reliance on *Kelly* is entirely misplaced. Far from being a separable or intelligible transaction in itself, the royalty payment is part and parcel of the illegal scheme to restrain signatory companies from dealing with non-signatory producers. The restrictive scheme is made effective only through the royalty provision. It is the royalty payment requirement which gives teeth to the restrictive arrangement because the royalty payment is the penalty a signatory must pay for purchasing non-signatory coal.

In *Kelly* the Court was able to separate the legal transaction for the sale of onions from the illegal scheme to restrain trade. The purchaser who received the thirteen carloads of onions was obligated to pay the price he had agreed to pay for them even though he had entered into a collateral agreement to hold them off the market as part of a collusive scheme to raise the market price. In requiring the purchaser to pay for the onions he had actually received the Court was not enforcing the *illegal* part of the contract, i.e. the collusive price-fixing scheme, but only the agreement to pay for goods received. The agreement to pay for goods received was, in the view of the Court, a separate intelligible transaction from the collateral agreement to hold the onions off the market.

There is no valid analogy between that situation and the present case. In the present case it is not possible to separate the obligation to pay the purchased coal royalty from the illegal boycott scheme, because it is only through the royalty payment that the illegal scheme is effectuated. The royalty payment is the sanction imposed by the contract for dealing with non-signatory producers, and when the courts enforce the obligation to pay the purchased coal royalty they are enforcing the scheme in restraint of trade. Hence, enforcement of the royalty payments here reaches, in the words of this Court, "[T]he point where the judgement of the Court would itself be enforcing the precise conduct made unlawful by the Act . . ." *Kelly* v. *Kosuga*, 358 U. S. at 520-521.

It is thus apparent that the Court of Appeals majority, and the trial court, misconceived the import of *Kelly*, and proceeded to draw from *Kelly* a completely false premise upon which to base their respective decisions in the present case.

THE PUBLIC POLICY CONSIDERATIONS CITED BY THE COURT OF APPEALS DO NOT JUSTIFY ENFORCEMENT OF AN ILLEGAL CONTRACT CLAUSE

In affirming the district court ruling the Court of Appeals majority chose to disregard the established law and public policy regarding unenforceability of illegal agreements, and proceeded to develop a series of superficial rationalizations for rejecting Kaiser's defenses. The majority opinion of the Court of Appeals, for example, purports to place great weight on considerations of "public interest," in respect to protecting the integrity of a collective bargaining agreement and the fostering of an orderly

administration of federal labor law. App. p. 32a, 33a. The majority also suggests that the trustees of a Union Welfare Fund should be "immune from contract defenses that could be asserted against the union itself because such a rule better serves the concern of federal labor policy to protect union members and their families from the actionable wrongs of their union representatives." App. p. 17a.

This reasoning is obviously specious. The "integrity" of collective bargaining agreements cannot be protected by a rule which sanctions and approves enforcement of such agreements even when they are patently illegal. If the courts reward illegality in union agreements there is not much "integrity" left to protect. Nor is it logical to say that enforcement of illegal clauses "fosters orderly administration of federal labor law."

There are, moreover, other compelling public policy considerations involved here which the majority did not attempt to balance. Both the Sherman Act and the Labor Management Relations Act reflect long-standing Congressional policy that interstate commerce must remain economically unhindered by unreasonable restraints of trade and illegal secondary boycotts. See, e.g. *Allen Bradley Co.* v. *Electrical Workers Union*, 325 U. S. 797 (1945); *Connell Co.* v. *Plumbers and Steamfitters Local*, 421 U. S. 616 (1975). Prior to ordering enforcement of the purchase-of-coal clause the courts below should have weighed all of the competing public policies involved to determine whether the public interest in enforcement of collective bargaining agreements is outweighed by those public policies militating against enforcement. By refusing to consider Kaiser Steel's affirmative defenses, and to examine into the effect of the objectionable contract clause on competition in the market for bituminous coal, the trial

court and the Court of Appeals abdicated basic responsibilities and prerogatives of the federal courts. By sanctioning enforcement of the purchase-of-coal clause without consideration of Kaiser's defenses the courts below are in the position of encouraging conduct which is not only destructive of the public interest but is also expressly prohibited by statute.

THE FEDERAL COURTS HAVE JURISDICTION TO DECIDE WHETHER A CONTRACT PROVISION VIOLATES SECTION 8(e) OF THE NATIONAL LABOR RELATIONS ACT

The purchase-of-coal clause constitutes in practical effect a union-coerced agreement to refrain from doing business with coal producers who are not signatory to the National Agreement of the UMWA, and, as such, creates a current and ongoing illegal hot cargo boycott against coal produced by neutral third parties who are not involved in any labor dispute with the union. The targets of such boycott are the non-signatory producers *and their employees.*

Section 8(e) of the National Labor Relations Act states that "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from . . . doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void."

Because the purchase-of-coal clause requires signatory employers, under pain of a monetary penalty, to refrain from purchasing coal from non-signatory companies it clearly falls within the section 8(e) prohibition,

and Kaiser Steel Company properly raised section 8(e) as a defense to enforcement of the purchased coal penalty here.

In refusing to consider Kaiser's section 8(e) defense the district court reasoned that because the conduct proscribed by section 8(e) is designated as an unfair labor practice the exclusive jurisdiction to consider the issue resides in the National Labor Relations Board; citing *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959). App. p. 77a. The Court of Appeals majority similarly concluded that an employer who voluntarily accedes to a hot cargo clause, "coerced only by the desire to avoid an economic strike," is relegated to an unfair labor practice remedy before the Board. App. p. 21a. The court majority went on to hold that while section 8(e) expressly provides that such agreements are unenforceable and void, the statute doesn't mean what it says, and that allowing Kaiser to assert a section 8(e) defense in this suit "would not only expand its remedies beyond what is necessary to give full effect to the language of the Act but would also interfere with protection to others which the labor law affords"—in this case the UMWA Trustees.

In reaching for this extraordinary interpretation of statutory language, which is plain and unambiguous on its face, the majority brushed aside the decision of this Court in *Connell Co.* v. *Plumbers and Steamfitters Local,* 421 U. S. 616 (1975), which constitutes a complete refutation of their reasoning. Since *Connell* stands on its own feet, and since further argument on this point will no doubt be fully developed in the brief which will be filed by Kaiser here, *amici* will not burden the Court with further discussion of this issue other than to say that the preemption ruling by the Court of Appeals is patently wrong, and is in direct conflict with the decisions of this Court.

CONCLUSION

The holding of the courts below that a contract clause may be enforced regardless of its illegality creates a precedent which could well be destructive of established principles of contract law. The trial court had a duty to examine into the illegality issues raised by Kaiser, and its refusal to do so was egregious error. The decision of the majority of the court of appeals compounds this error, and should be reversed.

Respectfully submitted,

FOR AMICUS CURIAE THE PENNSYLVANIA COAL MINING ASSOCIATION

STEVEN L. FRIEDMAN
Dilworth, Paxson, Kalish & Levy
2600 The Fidelity Building
Philadelphia, Pennsylvania 19109
(215) 546-3000

JOHN L. KILCULLEN
Kilcullen, Wilson and Kilcullen
Chartered
1800 M Street, N.W.
Washington, D.C. 20036
(202) 296-5700

Office-Supreme Court, U.S.
FILED
APR 23 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1345

In the Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION,
PETITIONER,

v.

JULIUS MULLINS, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[redacted] BRIEF *AMICUS CURIAE* OF THE TRUSTEES OF BOSTON UNIVERSITY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DAVID B. ELLIS
JOHN H. HENN*
KENNETH T. LOPATKA
FOLEY, HOAG & ELIOT
10 Post Office Square
Boston, Massachusetts 02109
(617) 482-1390
Counsel for Amicus Curiae Trustees of Boston University

April 23, 1981

* Counsel of Record

Blanchard Press, Inc., Boston, Mass.—Law Printers

TABLE OF CONTENTS

	Page
Table of Authorities	i
Motion of the Trustees of Boston University to File Brief *Amicus Curiae* in Support of Petition for Writ of Certiorari	1
Brief *Amicus Curiae* of the Trustees of Boston University in Support of Petition for Writ of Certiorari	3
Interest of *Amicus Curiae*	4
Summary of Argument	4
Argument	5
The Decision of the Court of Appeals in *Mullins* v. *Kaiser Steel Corporation* Raises Important Questions of Federal Law of Potentially Widespread Significance, as Already Shown by its Application to Litigation Involving Boston University	5
Conclusion	11
Appendix	A-1

TABLE OF AUTHORITIES

Cases:

District 65, UAW v. *Trustees of Boston University*, Civil Action No. 81-329-Z (D.Mass. March 24, 1981)	2, 7
Freund v. *Marshall & Ilsley Bank*, 485 F.Supp. 629 (W.D. Wis. 1979)	8
Frito-Lay, Inc. v. *Retail Clerks Local 7*, 629 F.2d 653 (10th Cir. 1980)	10
Hurd v. *Hodge*, 334 U.S. 24 (1948)	10
Local 1898, IAM v. *Brake & Electric Sales Corp.*, 279 F.2d 590 (1st Cir. 1960)	10
Mullins v. *Kaiser Steel Corp.*, No. 79-1463 (D.C. Cir. Sept. 17, 1980)	*passim*

Page

Perma-Line Corp. of America v. *Sign Pictorial & Display Union Local 230*, 639 F.2d 890 (2d Cir. 1981) 10

Steelworkers v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) 6

Trustees of Boston University v. *District 65, UAW*, Civil Action No. 81-198-Z (D.Mass. March 24, 1981). 2, 6

Trustees of Boston University v. *District 65, UAW*, No. 81-1208 (1st Cir.) 4

United Optical Workers Union Local 408 v. *Sterling Optical Co.*, 500 F.2d 220 (2d Cir. 1974) 10

Warehousemen Local 767 v. *Standard Brands, Inc.*, 579 F.2d 1282 (5th Cir. 1978), *cert. dismissed*, 441 U.S. 957, 443 U.S. 913 (1979) 10

Statutes:

Employee Retirement Income Security Act of 1974:

29 U.S.C. §§ 1001 *et seq.* 2, 5

§ 402, 29 U.S.C. § 1102 8

§ 404, 29 U.S.C. § 1104 8

§ 406, 29 U.S.C. § 1106 8

§ 409, 29 U.S.C. § 1109 10

§ 501, 29 U.S.C. § 1131 ..... 9, 10

§ 502, 29 U.S.C. § 1132 ..... 9, 10

§ 504, 29 U.S.C. § 1134 ..... 9, 10

Labor-Management Relations Act (Taft-Hartley Act):

§ 302, 29 U.S.C. § 186 7

National Labor Relations Act:

§ 8(a)(3), 29 U.S.C. § 158(a)(3) 7

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1345

KAISER STEEL CORPORATION,
PETITIONER,

v.

JULIUS MULLINS, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF THE TRUSTEES OF BOSTON UNIVERSITY TO FILE BRIEF *AMICIUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Trustees of Boston University ("Boston University" or "the University") respectfully move for leave to file the attached brief *amicus curiae* in this case. Counsel for both petitioner and respondents have consented to the filing of this brief to the extent it may be allowed under Supreme Court Rule 36(1), and letters evidencing such consent are being filed with the Clerk of the Court.

Amicus recognizes that its brief would be filed outside the time normally allowed by Rule 36(1), but it is only recently that circumstances have given the University reason to support the petition for writ of certiorari in this case. The petition seeks review of the decision of the Court of Appeals for the District of Columbia Circuit in *Mullins* v. *Kaiser Steel Corporation*, No. 79-1463 (D.C. Cir. Sept. 17, 1980). On March 24, 1981, the *Mullins* case was relied on by the United States District Court for the District of Massachusetts in litigation involving the University, when that court issued orders against the University compelling it to take certain actions, while refusing to consider the University's assertions that the actions being compelled would force the University to violate federal law. *Trustees of Boston University* v. *District 65, UAW*, Civil Action No. 81-198-Z (D. Mass. March 24, 1981); *District 65, UAW* v. *Trustees of Boston University*, Civil Action No. 81-329-Z (D. Mass. March 24, 1981).

The University as *amicus* would seek to call the attention of this Court to the fact that the significance of the *Mullins* case was very recently evidenced by its application in this litigation involving the University. The *Mullins* case was explicitly relied on to preclude the University from raising defenses under the Employee Retirement Income Security Act, 29 U.S.C. §§1001 *et seq.*, defenses different from those involved in *Mullins*, in factual circumstances other than those present in *Mullins*.

Respectfully submitted,

David B. Ellis
John H. Henn*
Kenneth T. Lopatka
Foley, Hoag & Eliot
10 Post Office Square
Boston, Massachusetts 02109
(617) 482-1390
Counsel for Amicus Curiae
Trustees of Boston University

April 23, 1981

* Counsel of Record

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1345

KAISER STEEL CORPORATION,
PETITIONER,

v.

JULIUS MULLINS, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF THE TRUSTEES OF BOSTON UNIVERSITY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Trustees of Boston University ("Boston University" or "the University") respectfully support the petition of Kaiser Steel Corporation for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit to review the

decision of that court in *Mullins* v. *Kaiser Steel Corporation*, No. 79-1463 (D.C. Cir. Sept. 17, 1980).

Interest of *Amicus Curiae*

Boston University, which was chartered in 1869 by a special act of the legislature of the Commonwealth of Massachusetts, is a private, non-profit institution of higher education located in Boston, Massachusetts. Certain employees of the University have recently been organized by District 65, United Automobile, Aerospace and Agricultural Implement Workers of America (the "UAW" or the "Union"), and the University and the UAW are now engaged in litigation regarding a particular provision of their collective bargaining agreement. As is more fully set forth below, the United States District Court for the District of Massachusetts compelled the University to take certain actions while refusing, in reliance on the decision of the Court of Appeals for the District of Columbia Circuit in *Mullins* v. *Kaiser Steel Corporation*, No. 79-1463, to consider the University's claims that the actions being compelled would force the University to violate federal law.[1] The *Mullins* case raises important questions of federal law, as shown by the fact that it has already been extended and applied to litigation involving statutory claims and factual circumstances other than those involved in *Mullins*.

Summary of Argument

The decision in *Mullins* v. *Kaiser Steel Corporation* is one which raises questions significant in the administration of the federal judicial system. Boston University, as *amicus*, seeks to call the attention of this Court to the fact that the importance of the *Mullins* case has already been evidenced by its very

[1] The Orders and Memorandum of Decision of the district court are set forth in the Appendix to this brief. The judgments and orders of the district court have been appealed by the University to the Court of Appeals for the First Circuit. *Trustees of Boston University* v. *District 65, UAW*, No. 81-1208 (1st Cir.).

recent application to litigation, in which the University was a party, involving statutory claims and factual circumstances other than those involved in *Mullins*. As a result, the University has been compelled by a federal court to engage in action that it believes to be illegal, without any opportunity to present and prove that illegality to the court.

Argument

THE DECISION OF THE COURT OF APPEALS IN *Mullins* v. *Kaiser Steel Corporation* RAISES IMPORTANT QUESTIONS OF FEDERAL LAW OF POTENTIALLY WIDESPREAD SIGNIFICANCE, AS ALREADY SHOWN BY ITS APPLICATION TO LITIGATION INVOLVING BOSTON UNIVERSITY.

The United States District Court for the District of Massachusetts has very recently ordered Boston University to make available to its employees a Union-sponsored health benefits plan which the University believes violates federal law. In issuing that order on March 24, 1981, the district court relied on *Mullins* v. *Kaiser Steel Corporation* in stating that it would "decline . . . to consider" the University's allegations that contributions to the plan would violate the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* In so ruling, the district court read *Mullins* as applying to statutory defenses other than those involved in the *Mullins* case, and also relied on the *Mullins* case in confirming an arbitrator's award which the University had immediately challenged on the ground that it compelled illegal conduct.

The University and the UAW executed their first collective bargaining agreement on October 5, 1979. During the course of negotiations, the UAW proposed that the University offer, in addition to two other health benefits programs, a Union-sponsored plan entitled the "65 Security Plan", which was described in a booklet submitted by the Union to the University during negotiations. The University maintained that the

descriptive booklet was insufficient to ascertain whether the plan complied with state and federal statutes. The University, therefore, before agreeing to offer the Union-sponsored plan, insisted on the execution of a memorandum which provided that the plan would not be offered to employees "until the Union has supplied the complete Health and Welfare contract for review by the University and then formal adoption as an appendix" to the collective bargaining agreement.

The UAW did not proffer a health benefits contract applicable to the University in purportedly final form until February 20, 1980. The plan presented at that time, the "BU 65 Security Plan", differed from the booklet presented to the University during negotiations. The University refused to implement the plan on the ground that it was materially different from the negotiated plan and that it violated federal law. After arbitration proceedings, an arbitrator rendered an award on December 29, 1980, directing the University to implement the plan, in effect finding as a matter of contract interpretation that the University had agreed to accept *any* plan the Union eventually produced as long as the University's contribution to it would remain constant.

At the same time, however, the arbitrator expressly declined to rule on the University's allegations that the plan and the University's contributions to it would be illegal, concluding that the issues could not appropriately be resolved in the arbitral forum.

Therefore, on January 28, 1981, the University filed a Complaint and Motion to Vacate Arbitration Award in the United States District Court for the District of Massachusetts, *Trustees of Boston University* v. *District 65, UAW*, Civil Action No. 81-198-Z. The University did not challenge the arbitrator's award as a matter of contract interpretation, conceding that any errors of contract interpretation would be within the range permitted under *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-99 (1960). Rather, the University alleged and offered to prove that the actions required by the arbitrator's award would violate federal law.

On February 5, 1981, the UAW filed an independent action in the same court to confirm and enforce the arbitrator's award, *District 65, UAW* v. *Trustees of Boston University*, Civil Action No. 81-329-Z. The actions were consolidated, and on March 4, 1981, the Union filed a motion for summary judgment in the consolidated actions.

In opposing the Union's motion for summary judgment, the University argued that the arbitrator's award directed the University to take action which would violate three federal statutes.[2] With regard to ERISA, the University submitted evidence gathered during discovery and offered to prove that, at a time when the 65 Security Plan as a whole was operating at an enormous deficit, the Union trustees of the plan[3] advocated the approval of the BU 65 Security Plan, knowing or having reason to know that the BU plan could not be self-

[2] In addition to the ERISA claim, the University asserted that enforcement of the arbitrator's award would violate Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), and Section 302 of the Taft-Hartley Act, 29 U.S.C. § 186. The Section 8(a)(3) claim was based on the fact that the Union health benefits plan was by its terms limited to Union members, and that, while the membership of Local 65 of the UAW had belatedly voted to allow non-members to participate in the plan, extension to non-members had not been approved by the trustees of the plan, who alone have the power to make changes in eligibility requirements. The University alleged that the plan violated Section 302 of the Taft-Hartley Act, which sets forth specific requirements for union-sponsored benefit plans, because, *inter alia*, employer trustees were not represented equally with employee trustees, the contribution required of the University by the arbitrator's award was inconsistent with the plan's Declaration of Trust, and the plan was manipulated so as to benefit the Union's institutional interests rather than being maintained for the sole and exclusive benefit of the plan's beneficiaries.

The district court also rejected these claims without resolving the merits of the University's specific allegations, but did not expressly rely on the decision in *Mullins* v. *Kaiser Steel Corporation*. App. A-6 to A-10.

[3] The 65 Security Plan is one purportedly designed to comply with Section 302(c) of the Taft-Hartley Act, 29 U.S.C. § 186(c), which imposes certain specific requirements on health benefit and other trust funds established by unions. Section 302(c), *inter alia*, requires a union-sponsored trust fund to have an equal number of employer and employee trustees, and a method for resolving deadlocks.

supporting and that the benefits it promised would require the diversion of trust assets from the contributions of other employers as well as plan reserves. The University also submitted evidence to prove that the Chairman of the Board of Trustees of the 65 Security Plan (who was also the Union President) withheld from the plan's employer trustees a formal actuarial report disclosing that the University's contributions were not remotely sufficient to fund the benefits promised the University's employees. These actions, the University alleged, violated the fiduciary obligations imposed by Section 404 of ERISA, 29 U.S.C. § 1104. The University also alleged that these actions violated Section 402 of ERISA, 29 U.S.C. § 1102, which requires that every plan be "maintained pursuant to a written instrument", because they were taken in derogation of a prior resolution of the board of Trustees that each benefit package was to be "self-supporting and not subsidized by the rest of the Security Plan." Finally, the University offered to prove that the diversion of trust assets contributed by other employers to subsidize benefits to the University's employees, made necessary by the fact that the benefits promised those employees would exceed the University's contributions, was a manipulation designed and intended to assist the Union in receiving more support and dues-paying members. Such a transfer of assets for the beneficial use of the Union, the University alleged, was not only a breach of fiduciary duty but also a prohibited transaction under Section 406 of ERISA, 29 U.S.C. §1106. The University asserted that it could find itself liable as a participant in a breach of fiduciary duty for contributing to the trust with knowledge that the trustees were violating their fiduciary responsibilities. See *Freund* v. *Marshall & Ilsley Bank*, 485 F.Supp. 629, 641-42 (W.D. Wis. 1979).

In orders and a memorandum of decision dated March 24, 1981, the district court dismissed the University's action and granted summary judgment to the UAW, ordering that the University immediately notify all employees in the bargaining

unit of the availability of the 65 Security Plan and make that plan available to them beginning on April 1, 1981. App. A-2. With respect to the ERISA allegations made by the University, the court stated that it "decline[d] the University's invitation to consider its ERISA defense", expressly relying on the decision of the Court of Appeals in *Mullins* v. *Kaiser Steel Corporation*, and reasoning that

> the statutory scheme of ERISA requires an employer to being its allegations to the Secretary of Labor, who has broad discretionary powers to investigate and enforce the fiduciary standards of the statute. . . .
>
> The University . . . has recourse to an administrative remedy through the Secretary of Labor, whereby its complaints and allegations concerning the management and operation of the 65 Security Plan can be investigated and, if proven, effectively remedied. App. A-11 to A-12.

The district court's decision manifests the importance of the issues involved in the *Mullins* case, and the potential significance of that case in a variety of circumstances other than those presented in *Mullins*. In the University's case, for example, the decision of the district court applied the reasoning of *Mullins* to claims arising under ERISA, statutory defenses not involved in *Mullins*, and remitted the University to "an administrative remedy through the Secretary of Labor, who has broad discretionary powers to investigate and enforce the fiduciary standards of the statute." Unfortunately, however, nothing in ERISA expressly requires the Secretary of Labor to exercise his "discretionary powers" to act on a complaint by an employer, see 29 U.S.C. §§1131, 1132, 1134, and ERISA contains no express provision for judicial review either of the Secretary's failure to act on a complaint or of an erroneous administrative determination by the Secretary that a complaint is without merit. Moreover, the "administrative remedy" relied on by the district court would have been illusory, where the arbitration award giving rise to the con-

troversy was issued on December 29, 1980, and the University was compelled by the court to take action only three months later, on April 1, 1981.[4]

Thus the University has at this time been compelled by a court relying on the *Mullins* case to implement a plan which it believes is unlawful, while being denied by that same court the right to a determination whether its belief is well founded or whether by implementing the plan it will be contributing to a violation of federal law. Not only is the decision in *Mullins* contrary to the decisions of other circuits, which require a federal court to resolve legal issues on their merits,[5] but also it is contrary to the University's perceptions of its rights and obligations. This is not a case where a party to a contract has seen its claims of illegality tried and been assured that there is no illegality. Rather, the University has been told by a court that, even if the BU 65 Security Plan is illegal, it must nonetheless offer the plan and contribute to it. A major institution of higher learning is continually subject to public scrutiny, must depend on public good will for its financial health, and bears an institutional obligation to advance the public welfare through the encouragement of ethical discourse

---

[4] For the "administrative remedy" to mean anything, the Secretary of Labor would apparently have been required to have received the University's complaint; to have initiated and conducted an investigation of that complaint, which could have included making a preliminary determination of "reasonable cause" before proceeding with the investigation, inspecting books and records, and questioning individuals, see 29 U.S.C. §1134(a)(2); to have determined whether either civil or criminal action was appropriate and, if so, to have filed either a criminal, *id.*, §1131, or civil, *id.* §§1109, 1132(a)(2), (5), and (6), action; and to have concluded that civil or criminal action successfully, obtaining either an injunction or other relief enforcing the provisions of ERISA, *id.*, all in three months.

[5] *See, e.g., Perma-Line Corp. of America* v. *Sign Pictorial and Display Union Local 230*, 639 F.2d 890 (2d Cir. 1981); *Frito-Lay, Inc.* v. *Retail Clerks Local 7*, 629 F.2d 653 (10th Cir. 1980); *Warehousemen Local 767* v. *Standard Brands, Inc.*, 579 F.2d 1282, 1291-93 (5th Cir. 1978), *cert. dismissed*, 441 U.S. 957, 443 U.S. 913 (1979); *United Optical Workers Union Local 408* v. *Sterling Optical Co.*, 500 F.2d 220 (2d Cir. 1974); *Local 1898, IAM* v. *Brake & Elec. Sales Corp.*, 279 F.2d 590 (1st Cir. 1960). *Cf. Hurd* v. *Hodge*, 334 U.S. 24, 34-35 (1948).

and conduct. The University, such an institution, is understandably reluctant to accept the conclusion that the rule set forth in *Mullins*, compelling it to take action while precluding consideration of its claims of illegality, is the law of the land.

Conclusion

For the reasons set forth above, Boston University respectfully urges that the petition of Kaiser Steel Corporation for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit be granted.

Respectfully submitted,

DAVID B. ELLIS
JOHN H. HENN*
KENNETH T. LOPATKA
FOLEY, HOAG & ELIOT
10 Post Office Square
Boston, Massachusetts 02109
(617) 482-1390
Counsel for Amicus Curiae
Trustees of Boston University

April 23, 1981

* Counsel of Record

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 81-198-Z
TRUSTEES OF BOSTON UNIVERSITY
v.
DISTRICT 65,
UNITED AUTOMOBILE WORKERS

ORDER

ZOBEL, *D.J.*

In accordance with the Memorandum of Decision dated March 24, 1981, it is

ORDERED that the action by the Trustees of Boston University to vacate the arbitrator's award issued December 29, 1980 be and hereby is dismissed.

March 24, 1981 — RYA W. ZOBEL

DATE — DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 81-329-Z
DISTRICT 65,
UNITED AUTOMOBILE WORKERS
v.
TRUSTEES OF BOSTON UNIVERSITY

ORDER

ZOBEL, *D.J.*

In accordance with the Memorandum of Decision dated March 24, 1981, it is

ORDERED that the arbitrator's award be and hereby is confirmed;

AND IT IS FURTHER ORDERED that the University shall make the 65 Security Plan available forthwith.

AND IT IS FURTHER ORDERED that the University shall forthwith notify all employees in the Local 65 bargaining unit of the immediate availability of the 65 Security Plan. Such notice shall be given before the commencement, on April 1, 1981, of the annual open enrollment period for health plans, and shall offer the 65 Security Plan as one of the health plan options available during that open enrollment period.

March 24, 1981 — RYA W. ZOBEL
DATE — DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 81-198-Z
TRUSTEES OF BOSTON UNIVERSITY
v.
DISTRICT 65,
UNITED AUTOMOBILE WORKERS

• • •

Civil Action No. 81-329-Z
DISTRICT 65,
UNITED AUTOMOBILE WORKERS
v.
TRUSTEES OF BOSTON UNIVERSITY

MEMORANDUM OF DECISION

ZOBEL, *D.J.*

These cases, which have been consolidated, arise from an arbitration award that ordered the Trustees of Boston University (the "University") pursuant to the collective bargaining agreement between the University and District 65, United Automobile Workers (the "Union") to make contributions to the "65 Security Plan", a health benefits plan (the "Fund"), and to make the proposed Boston University Plan (the "Plan") available to eligible employees. The University sues under Sections 301 and 302 of the Labor Management Relations Act, 29 U.S.C. §§185 and 186 ("LMRA") and under Sections 10 and 12 of the United States Arbitration Act, 9 U.S.C. §§10 and 12, to vacate the arbitration award and to enjoin the Union from demanding and collecting any contributions from the University to the Fund on the ground that these contributions would be illegal because the Plan violates Section 302 of the LMRA and various provisions of the Employees Retirement Income Security Act, 29 U.S.C. §1001 *et seq.* ("ERISA"). The Union responded with its action under Section 301 to confirm and enforce the award. Since the University in defense relies on the

same alleged violations of Section 302 of LMRA and ERISA as form the basis of its suit, the issues in both cases are identical and the cases are properly consolidated and considered together.

The matter is before me on the Union's motion for summary judgment. The uncontested factual and procedural background can be summarized briefly. On October 5, 1979 the Union and the University entered into a collective bargaining agreement which was made effective as of September 6, 1979 and which expires June 30, 1981 (the "Agreement"). Article XXXVI of that Agreement provides that the University shall offer, in addition to Blue Cross/Blue Shield Master Medical and Harvard Community Health Plan, the option for employees to be covered by the 65 Security Plan.[1] The Agreement sets the University's contributions at a stated percentage of the Blue Cross/Blue Shield premium, but provides that such a program would not be effective until a detailed plan had been submitted and adopted by the University. On February 20, 1980 the Union submitted a brochure detailing the proposed benefits plan. The University refused to adopt the Plan, on the ground that the proposed program provided benefits different from those to which it had agreed in the Agreement.

---

[1] Article XXXVI of the Agreement provides in full:

Health Insurance

The University will continue to offer coverage under Blue Cross/Blue Shield Master Medical, the Harvard Community Health Plan, and the 65 Security Plan, and will maintain this coverage for the term of the contract. Employees covered by this Agreement may elect to be covered by only one (1) such plan. Cost of these plans will be apportioned in the following manner:

> Effective October 1, 1979, the employer's contribution to any plan selected from the choices offered above shall be the dollar amount equal to fifty-eight (58) percent of the prevailing Blue Cross/Blue Shield Master Medical premium. Effective July 1, 1980, the employer's contribution shall be the dollar amount equal to sixty (60) percent of the prevailing Blue Cross/Blue Shield Master Medical premium.
>
> Election of a plan must be made upon initial employment or at such time as an open enrollment period is made available by the University.

On March 26, 1980 the Union filed a grievance and on April 8, 1980, it submitted the grievance to arbitration in accordance with Article XIV of the Agreement. The arbitrator held hearings on June 13, July 28, August 8 and September 22 and 29, 1980. The parties offered testimonial and documentary evidence, including testimony of actuaries; and both submitted briefs. On December 29, 1980 the arbitrator issued an award as follows:

> The University violated Article XXXVI of the collective bargaining agreement by failing to offer coverage under the 65 Security Plan during the open enrollment period from April 1 to April 30, 1980. The University should make the 65 Security Plan available forthwith, with an open enrollment period as soon as is practically possible. Employees who have been denied coverage by the 65 Security Plan should be made whole.

In the body of his decision, the arbitrator, while noting that a detailed judgment as to the actuarial soundness of the Plan was not necessary, found that "the assets of the fund appear to be more than adequate to provide the benefits specified in the plan, even if a shortfall should occur. The fact that the Fund has been in existence since 1945 and has paid out over $150 million in claims is an impressive statistic." In addition, the arbitrator found that "the membership voted to make all employees in the bargaining unit eligible to participate in the 65 Security Plan."

On about December 31, 1980, the Union requested the University to comply with the arbitrator's award, but the latter on January 28, 1981 filed this action to vacate the award in this Court. On February 5, 1981 the Union filed its complaint to confirm the award and for a preliminary injunction. Because the Union had not demonstrated irreparable harm if preliminary relief were not granted, the Court on March 3, 1981 denied the preliminary injunction but ordered expedited discovery and scheduled these cases for trial on March 16, 1981.

On April 1, 1981 the University's annual "open-enrollment" period begins, during which University employees may designate health plans for the coming year.[2] On May 1, 1981 negotiations are scheduled to begin between the Union and the University for a new collective bargaining agreement. The current Agreement, including the article which requires that the 65 Security Plan be made available, expires on June 30, 1981.

The issues in these cases have been substantially narrowed after a pretrial conference by the pretrial order of March 20, 1981. The order accepted as conclusive the arbitrator's findings, after hearing evidence from both parties, that the Boston University Plan is actuarially adequate and that the resources of the Fund are sufficient. Accordingly, acceptance of the Plan by the trustees of the Fund does not on either ground constitute a breach of their fiduciary responsibility.

In light of the pretrial order, two categories of issues remain in the case and as to them the facts are not in dispute. The first concerns the alleged violations of section 302; the second, the alleged violations of ERISA.

This Court's jurisdiction to restrain violations of section 302 is, in light of the Federal scheme of labor statutes, quite narrow. The Court may restrain only "violations of basic structure, as determined by Congress, not violations of fiduciary obligations or standards of prudence in the administration of the trust funds." *Bowers* v. *Ulpiano Casal, Inc.*, 393 F.2d 421, 424 (1st Cir. 1968). The Supreme Court examined the purpose and legislative history of section 302 in *Arroyo* v. *United States*, 359 U.S. 419 (1959) and concluded that the Congressional concern behind the section was "with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to

[2] The University within the last two weeks sent letters to all employees in the bargaining unit announcing the "open-enrollment" period and describing two options — Blue Cross/Blue Shield Master Medical and Harvard community Health Plan. The "65 Security Plan" is not mentioned in the letter.

their sole control." 359 U.S. at 425-426. The types of violations identified by the First Circuit in *Ulpiano Casal* as structural respond to this concern to prevent corruption and overreaching by union officials, and in that context include, among others, "contributions to a trust fund which was not established for the sole and exclusive benefit of employees and dependents; . . . which did not set forth in writing the detailed basis of payments, which did not have equal representation of employees and employers with provision for a neutral person or umpire." 393 F.2d at 424, n.4. This jurisdictional limit on the court's power to enjoin violations sets an "admittedly . . . severe standard" but one which "was compelled by legislative history and followed by a majority of cases." *Bowers* v. *Moreno*, 520 F.2d 843, 846 (1st Cir. 1975). The initial task, therefore, is to analyze each of the University's claims and defenses to determine whether the allegations are sufficient to constitute structural violations or whether they concern merely "day to day fiduciary administration of welfare and pension funds" over which the Court has no jurisdiction. *Turner* v. *Loc. U. No. 302, Inter. Broth. of Team.*, 604 F.2d 1219, 1227 (9th Cir. 1979).

The University first alleges that because the payments which it is required to make under the arbitrator's award, are based on a percentage of the Blue Cross/Blue Shield premium rather than on a percentage of payroll, they are different in kind from the payments made by all other employers who contribute to the Fund, and therefore violate the "similar payments" requirement of section 302(c)(5). Even if the University's proposed payments are to be calculated on a basis different from those of other employers, such a difference of payment method cannot and does not constitute a violation of the structure of the 65 Security Plan as a whole.

Second, the University alleges that its payments to the Fund will be insufficient to pay for the proposed benefits to covered employees. As a result, contributions made by other employers will necessarily be drawn upon to provide benefits to University employees, in violation of the requirement in section 302

(c)(5) that all employer payments be made "for the sole and exclusive benefit of the employees of such employer." While a violation of the "sole and exclusive benefit" requirement may constitute a structural violation, analysis of the University's factual allegations in light of the relevant law demonstrates that, even if accepted as true they would not operate to violate the exclusive benefit requirement.

It has consistently been held that the "sole and exclusive benefit" clause does not "require that each employee's benefit be "traced" to the value of the payments by that employee's employer." *Crawford* v. *Cianciulli*, 357 F.Supp. 357, 372 (E.D.Pa. 1973); *Kreindler* v. *Clarise Sportswear Co., Inc.*, 184 F.Supp. 182 (S.D.N.Y. 1960). The very nature of a multi-employer fund involves the mingling of employer contributions to create a pool out of which particular employees receive benefits; risks are shared, at least to some extent, among all employers. In *Crawford*, *supra*, the court considered whether the exclusive benefits requirement was violated by payments from a multi-employer fund to employees of employers who had ceased making contributions to the fund and whose past contributions had been exhausted. Although such payments were necessarily funded by contributions from other employers because the recipients' employer's contributions had all been disbursed, the Court found no violation:

> Congress was not concerned with the possible risks of "unfunded liabilities" incurred by an employer who contributed to a multi-employer established trust fund. Nor was it concerned with how the payments contributed to a multi-employer fund were administered among the employees of employers contributing so long as payments made by any particular employer were not used to the exclusion of such employer's employees. 357 F.Supp. at 372.

In the present case, there is no allegation that employees of the University, or of any other employer, will be excluded from receiving benefit payments. On the contrary, the allegations merely assert that benefits to University employees will be funded to some unknown extent by contributions paid into

the fund by other employers. This is precisely what was held by the *Crawford* court to be consistent with section 302. In a somewhat similar case the Supreme Court recently considered whether an employer may, in light of section 302, make benefit contributions measured not only by the hours worked by his own employees who were fund beneficiaries, but measured as well by the hours worked by the non-beneficiary employees of a sub-contractor. The Court found no violation either of the letter or the spirit of section 302, because the challenged scheme did no disservice to the Congressional purpose of section 302 to combat corruption, bribery, extortion and abuse of power by union officers. *Walsh* v. *Schlecht*, 429 U.S. 401, 410-411 (1977).

Similarly here, the Plan as proposed does not run afoul of the Congressional purpose in enacting section 302. The mere fact that contributions from other employers may fund benefits to University employees is, in light of that Congressional purpose, not enough to make out a violation of the exclusive benefits requirement of 302(c)(5).

The third allegation of impropriety under section 302 is that the union trustees of the Fund violated their fiduciary duties by allegedly providing incomplete or misleading information to employer trustees with respect to the Plan, and by generally dominating the employer trustees. Such alleged fiduciary violations were explicitly removed from the ambit of the Court's jurisdiction by the two *Bowers* cases. Although a fiduciary violation, such as alleged abuse of trust funds might potentially become structural if it conflicted with the purposes behind section 302, the allegations here relate to the methods by which trustees went about their business and are clearly operational rather than structural.

The University also alleges that there was unequal employer/Union representation because at the meeting at which the trustees of the Fund voted to adopt the B.U. Plan there was a vacancy among employer trustees. Here again,

Ulpiano Casal identified as a potential structural violation a plan "which did not have equal representation of employees and employers with provision for a neutral person or umpire," 393 F.2d at 424, n.4. The University has not alleged that the trust agreement of the Fund provides for an unequal number of employer and employee trustees. Nor does it allege, as was the case in *Nedd* v. *United Mine Workers of Am.*, 556 F.2d 190 (9th Cir. 1977), that an imbalance in trustees existed for many years and during a time that a fund permitted employer contributions to become dangerously delinquent. On the contrary, the most that can be said here is that the employer trustees themselves delayed for over a year in replacing one of their number who had resigned. It would be an inappropriate application of *Ulpiano Casal* to hold that such temporary indecision and inaction by employer representatives constitutes a structural violation of the fund as a whole which would render illegal employer contributions to the Fund.

The University next asserts that the vote of the Fund's trustees in August 1980 accepted a plan limited to union members. The assertion is foreclosed by the findings of the arbitrator and is insufficient in law. The arbitrator found that the membership voted in June 1980 to offer the Plan to all employees in the bargaining unit, and he found the all inclusive Plan to be actuarially adequate. Thus the trustees did not breach any fiduciary obligation and their action is, at best, an operational matter. Finally, the university claims the absence of a written agreement specifying the detailed basis of payments to the Plan; if true, this would be a "structural" violation, *Bowers* v. *Ulpiano Casal*. However, a collective bargaining agreement with the contributing employer, which sets forth the basis on which payments are to be made satisfies the statutory requirement. *Moglia* v. *Geoghegan*, 403 F.2d 110 (2d Cir. 1968). The Agreement between the University and the Union in this case does specify in detail payments to be made. As a matter of law, this Agreement meets the 302(c)(5) requirement for a "written agreement", and there is no violation.

The University also relies on various alleged violations of ERISA. The enforcement provision of ERISA, 29 U.S.C. §1132, provides that civil actions may be brought only by a participant, beneficiary, or fiduciary of a fund, or by the Secretary of Labor. An employer who contributes to employee benefit plans does not fit into any of these categories. *Wong* v. *Bacon*, 445 F.Supp. 1177, 1183 (N.D.Cal. 1977). Instead, the statutory scheme of ERISA requires an employer to bring its allegations to the Secretary of Labor, who has broad discretionary powers to investigate and enforce the fiduciary standards of the statute. The Congressional intent in establishing ERISA was to allocate to the employer an administrative remedy only, thus protecting the courts and plan beneficiaries from employers' use of ERISA to obstruct actions for contractually agreed-upon contributions. In this respect the ERISA defense is analogous to an unfair labor practice defense which is precluded in favor of the employer's administrative remedies. *Mullins* v. *Kaiser Steel Corp.*, ____ F.2d ____, No. 79-1463 (D.C. Cir. 1980) In that case, an action for contributions to a welfare fund, the court refused to entertain a defense, based on an alleged violation of the "hot cargo" provisions of the NLRA. The Court considered the proposed defense in enough detail to ascertain that an administrative remedy through the NLRB was available, and held the employer to that remedy.[3]

[3] Congressional intent to ensure that welfare fund beneficiaries be able to compel, without undue hindrance and expense, contractually required contributions to funds, is further underlined by recent remarks of Congressman Frank Thompson, Chairman of the House Labor Management Relations Subcommittee in connection with recent amendments to ERISA. After delineating the problems created by employers who are unwilling to make their promised contributions, the Congressman went on to endorse cases holding that events such as trustee misconduct and labor strikes do not abrogate an employer's duty to contribute, and he concluded that "Federal pension law should permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law — other than 29 U.S.C. §186. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises." Cong.Rec. (1980) No. 14, 4.7899 (Aug. 26, 1970).

> "an employer could effectively circumvent the authority of the Board simply by doing what Kaiser suggests: freely ignore an agreement it signed and then defend in an action to enforce it on the ground that it violated section 8(e) and should not be enforced. To allow that result would undermine the enforcement scheme Congress endeavored to devise and would be inconsistent with the principle of primary jurisdiction that has so long been a part of federal labor law. (slip op. at p. 26)

The University also has recourse to an administrative remedy through the Secretary of Labor, whereby its complaints and allegations concerning the management and operation of the 65 Security Plan can be investigated and, if proven, effectively remedied. For this Court to become involved in a detailed examination of various alleged breaches of fiduciary duty by Fund trustees would not only frustrate the Union's ability to obtain simple and straightforward relief through enforcement of the arbitrator's award, but would also counter the careful statutory scheme. I therefore decline the University's invitation to consider its ERISA defense.

For the reasons stated, the Union's motion for summary judgment is allowed. Judgment may be entered in Civil Action No. 81-198 dismissing the complaint. In Civil Action No. 81-329 judgment may enter confirming the arbitrator's award and ordering the University to comply therewith.

March 24, 1981 — RYA W. ZOBEL

DATE — DISTRICT JUDGE

Office-Supreme Court, U.S.
FILED
AUG 31 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1345

In the Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION, PETITIONER

v.

JULIUS MULLINS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

BARBARA E. ETKIND
Assistant to the Solicitor General

ROBERT B. NICHOLSON
ROBERT J. WIGGERS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

T. TIMOTHY RYAN, JR.
Solicitor of Labor
Department of Labor
Washington, D.C. 20210

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether Section 306(a) of the Multiemployer Pension Plan Amendments Act of 1980 bars Kaiser from raising as defenses to this collection suit by trustees of employee benefit plans the alleged illegality under the antitrust laws, 15 U.S.C. 1 and 2, and Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), of the provision of the collective bargaining agreement that requires Kaiser to make contributions to the plan.

2. Whether Section 306(b) of the 1980 Amendments requires affirmance of the award of attorneys' fees to the trustees.

TABLE OF CONTENTS

	Page
Statutes involved	1
Statement	1
Summary of argument	10
Argument:	
I. Applicable law precludes Kaiser from raising the defense of illegality under the antitrust laws or Section 8(e) of the NLRA in this action by trustees of pension and welfare funds	13
A. Section 306(a) of the 1980 Amendments precludes the raising of Kaiser's illegality defenses	15
1. Section 306(a) makes an employer liable for all prescribed contributions except those the very making of which would itself be unlawful	15
a. The statutory language	15
b. The legislative history	16
2. The making of the payments required by the purchase-of-coal clause is not, in and of itself, unlawful	29
B. Section 306(a) of the 1980 Amendments is applicable to this case	31
1. Nature and identity of the parties	32
2. The nature of the rights affected	33
3. Nature of the impact of the change in law	34
II. Under applicable law, the trustees are entitled to attorneys' fees	36
Conclusion	37
Appendix A	1a

TABLE OF AUTHORITIES

Cases: Page

Bishop v. *Wood*, 426 U.S. 341 6
Bradley v. *Richmond School Board*, 416 U.S. 696.... 11, 12, 31, 32, 33, 34, 35, 37
Bruce's Juices, Inc. v. *American Can Co.*, 330 U.S. 743 14
Connell Construction Co. v. *Plumbers Local No. 100*, 421 U.S. 616 35
Connolly v. *Union Sewer Pipe Co.*, 184 U.S. 540..... 14
Consolidated Express, Inc. v. *New York Shipping Association*, 602 F.2d 494, vacated and remanded on other grounds, 448 U.S. 902 35
Continental Wall Paper Co. v. *Louis Voight & Sons Co.*, 212 U.S. 227 14
Contractors, Etc. v. *Associated Wrecking Co.*, 638 F.2d 1128 29
Cort v. *Ash*, 422 U.S. 66 31
Ewell v. *Daggs*, 108 U.S. 143 34
Gross v. *United States Mortgage Co.*, 108 U.S. 477.. 34
Home Building & Loan Association v. *Blaisdell*, 290 U.S. 398 34
Huge v. *Long's Hauling Co.*, 590 F.2d 457, cert. denied, 442 U.S. 918 .....14, 20, 24, 25, 26, 27, 28, 29, 33
Huge v. *Old Home Manor, Inc.*, 419 F. Supp. 1019.. 17, 18
Hutto v. *Finney*, 437 U.S. 678 31
Kelly v. *Kosuga*, 358 U.S. 516.....6, 7, 9, 12, 13, 14, 34
Lewis v. *Benedict Coal Corp.*, 361 U.S. 459..8, 14, 25, 28, 33
Lewis v. *Mill Ridge Coals, Inc.*, 298 F.2d 552.....26, 28, 33
Lewis v. *Seanor Coal Co.*, 382 F.2d 437, cert. denied, 390 U.S. 947 17
McMullen v. *Hoffman*, 174 U.S. 639 .....12, 14, 34
McNair v. *Knott*, 302 U.S. 369 34
National Stabilization Agreement of the Sheet Metal Industry Trust Fund v. *Commercial Roofing & Sheet Metal*, Nos. 78-1761, 78-2071 (D.C. Cir. May 4, 1981) 24
Nedd v. *United Mine Workers*, 556 F.2d 190, cert. denied, 434 U.S. 1013 17
Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 35

Cases—Continued

	Page
Riverton Coal Co. v. *UMWA*, 453 F.2d 1035, cert. denied, 407 U.S. 915	35
Small Co. v. *American Sugar Refining Co.*, 267 U.S. 223	14
Thorpe v. *Housing Authority of Durham*, 393 U.S. 268	31, 32
United Mine Workers of America (Dixie Mining Co.), 188 N.L.R.B. 753, appeals dismissed on other grounds, 468 F.2d 1139	35
United States v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103	12, 31, 32, 33
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1	34
Waggoner v. *McGray*, 607 F.2d 1229	20
Walsh v. *Schlecht*, 429 U.S. 401	30, 31
Washington Area Carpenters' Welfare Fund v. *Overhead Door Co.*, 488 F. Supp. 816	20, 28
West Side Belt R.R. v. *Pittsburgh Construction Co.*, 219 U.S. 92	34
Western Washington Cement Masons Health & Security Trust Funds v. *Hillis Homes, Inc.*, 107 L.R.R.M. 2897	29
Western Washington Laborers-Employers Trust Fund v. *McDowell*, 103 L.R.R.M. 2219 (W.D. Wash. 1979)	20, 28
Wilder Mfg. Co. v. *Corn Products Co.*, 236 U.S. 165	14

Statutes:

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*	1, 16, 33, 36
Section 203, 29 U.S.C. 1053	17
Sections 301-306, 29 U.S.C. 1081-1086	16
Section 404(a)(1)(B), 29 U.S.C. 1104(a)(1)(B)	16
Section 406(a)(1)(B), 29 U.S.C. 1106(a)(1)(B)	16
Section 502, 29 U.S.C. 1132	3, 9, 18
Section 502(a)(3), 29 U.S.C. 1132(a)(3)	9
Section 502(g), 29 U.S.C. 1132(g)	9

Statutes—Continued **Page**

Labor-Management Relations Act of 1947, 29 U.S.C. 141 *et seq.*:
Section 301, 29 U.S.C. 185 ..... 3, 9
Section 302, 29 U.S.C. (& Supp. III) 186 ..... 11, 16, 23, 24, 30
Section 302(c)(5), 29 U.S.C. 186(c)(5) ..24, 30, 31
Section 302(c)(5)(B), 29 U.S.C. (Supp. III) 186(c)(5)(B) 17
Section 303, 29 U.S.C. 187 35
Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 *et seq.* 9
Section 108(c)(1), 94 Stat. 1267 ..... 10, 32, 2a
Section 306, 94 Stat. 1295 ..... 10, 20, 31, 32
Section 306(a), 94 Stat. 1295 ..... *passim*, 1a
Section 306(b), 94 Stat. 1295 .... 10, 13, 19, 36, 1a-2a
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
Section 8, 29 U.S.C. 158 7
Section 8(b)(4), 29 U.S.C. 158(b)(4) 8
Section 8(e), 29 U.S.C. 158(e) ..... *passim*
Section 8(f), 29 U.S.C. 158(f) 28
Sherman Act, 15 U.S.C. 1 *et seq.*:
Section 1, 15 U.S.C. 1 3
Section 2, 15 U.S.C. 2 3

Miscellaneous:

126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) ..21, 24, 36
126 Cong. Rec. S10102 (daily ed. July 29, 1980) .. 22
126 Cong. Rec. S11673 (daily ed. Aug. 26, 1980) .. 22, 24-25, 36
Department of Labor Advisory Opinion 78-28A (Dec. 5, 1978), *reprinted in* Pens. L. Rep. (BNA) No. 221 at R-25 (Jan. 8, 1979) 17
ERISA Improvements Act of 1978: Joint Hearings on S. 3017 Before the Subcomm. on Labor of the Senate Comm. on Human Resources and the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the Senate Comm. on Finance, 95th Cong., 2d Sess. (1978) 19

Miscellaneous—Continued Page

ERISA Improvements Act of 1979: Hearings on S. 209 Before the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. (1979).. 19
H.R. 3904, 96th Cong., 1st Sess. (1979) 20, 21
H.R. Rep. No. 93-533, 93d Cong., 1st Sess. (1973).. 16
Multiemployer Pension Plan Amendments Act of 1979: Hearings on S. 1076 Before the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. (1979) 18
Multiemployer Pension Plan Termination Insurance Program: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. (1979) 18
Oversight of ERISA, 1977: Hearings on S. 2125 Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. (1977) 18, 19
Prohibited Transaction Exemption 76-1, 41 Fed. Reg. 12740 (1976) 17, 18
S. 3017, 95th Cong., 2d Sess. (1978) 19
S. 209, 96th Cong., 1st Sess. (1979) 19
S. 1076, 96th Cong., 1st Sess. (1979) 20
Staff of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *The Multiemployer Pension Plan Amendments Act of 1980, S. 1076: Summary and Analysis of Consideration* (Comm. Print 1980) 20, 21, 2a-3a
The Multiemployer Pension Plan Amendments Act of 1979: Hearing on H.R. 3904 Before the House Comm. on Ways and Means, 96th Cong., 2d Sess. (1980) 18
The Multiemployer Pension Plan Amendments Act of 1979: Hearings on H.R. 3904 Before the Task Force on Welfare and Pension Plans of the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor, 96th Cong., 1st Sess. (1979) 18-19

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1345

KAISER STEEL CORPORATION, PETITIONER

v.

JULIUS MULLINS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order of May 4, 1981, inviting the Solicitor General to express the views of the United States (A. 81).*

STATUTES INVOLVED

In addition to the statutes cited in the petition and in petitioner's brief (Pet. 2, Br. 2, Pet. App. 85a-88a), recent amendments to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, which also are relevant, are set forth in Appendix A, *infra*.

STATEMENT

1. Petitioner is a member of the Bituminous Coal Operators Association (BCOA), a multiemployer bargaining association of coal producers. In 1974, the BCOA, together with other coal operator associations and various

* "A." references are to the joint appendix filed in this Court. "J.A." references are to the joint appendix filed in the court of appeals.

individual coal operators, entered into a collective bargaining agreement with the United Mine Workers of America for the period December 6, 1974, to December 6, 1977, known as the National Bituminous Coal Wage Agreement of 1974 (A. 70).

In Article XX of the 1974 Agreement, the signatory employers agreed to contribute to four employee health and retirement trust funds.[1] Section (d)(1) of Article XX required each signatory employer to pay to the trust funds a specified amount for each ton of coal it produced, for each hour worked by covered employees, and for each ton of coal "procured or acquired by such [e]mployer for use or for sale on which contributions to the appropriate [T]rusts as provided for in this Article have not been made * * *" (A. 31, 70-71) (the purchase-of-coal clause).[2] Section (d) of Article XX also provided that if the purchase-of-coal clause were found invalid by any court or agency the Union could demand negotiations "upon a clause to be inserted into this Agreement in replacement of the provision found invalid or unlawful" (A. 32), and Article XXIX, Section (b), permitted termination of the Agreement in such circumstances (J.A. 56). Finally, Article XX, Section (d)(5), required employers to furnish the fund trustees with monthly statements showing "the full amounts due hereunder and the tons of coal produced, procured or acquired for use or for sale and the hours worked with respect to which the amounts are payable" (A. 35).

---

[1] The four separate trust funds—the 1950 Pension Trust, the 1950 Benefit Plan and Trust, the 1974 Pension Trust and the 1974 Benefit Plan and Trust (A. 28-29)—are held by the same set of three trustees. Contributions to all four trust funds are involved in this litigation.

[2] Section (d)(1) explained that the tonnage requirements of the purchase-of-coal clause were the same as the tonnage plus man-hour payments required for produced coal because, for the purpose of the purchase-of-coal clause, the hourly contributions had been converted to their tonnage equivalents (A. 31; see also J.A. 463-464).

2. Respondents, the trustees of the funds, filed this action on April 11, 1978. They asserted jurisdiction under both Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. 185, and Section 502 of ERISA, 29 U.S.C. 1132 (A. 11), and alleged that Kaiser had failed to make all contributions due the funds under the 1974 Agreement and that it also had failed to report purchases of coal on which it had not made contributions to the funds (A. 13). The trustees sought an order requiring Kaiser to file reports on coal purchased by it during the period of the 1974 Agreement and to pay the amounts due thereon plus attorneys' fees (A. 13-14).

In its answer, Kaiser admitted that it had purchased coal and had not reported the purchases (A. 58-59). It asserted as affirmative defenses that "[t]he provisions of the 1974 Agreement on which plaintiffs rely are, and were at their inception, void and unenforceable" as violative of Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), and Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2 (A. 59).

On cross-motions for summary judgment, submitted on written affidavits, Kaiser presented the following evidence: Kaiser is a steel manufacturer that produces and purchases coal for use in its steel manufacturing operations (J.A. 475). Its manufacturing processes require mid-volatile coking coal as well as the high-volatile coal that Kaiser produces from its own mines (J.A. 480). Kaiser purchases the mid-volatile coal it requires from Mid-Continent Coal and Coke Company, which it considers the most economical source available (J.A. 466, 480). Mid-Continent's employees are represented by the Redstone Workers Association, not by the UMW (J.A. 327), and officers of Mid-Continent and Kaiser stated that the wages and benefits received by Mid-Continent's employees were equal or superior to those required by the UMW contract (J.A. 329-333, 480-481). Nonetheless, Kaiser affiants stated, the UMW has long sought to organize Mid-Continent's employees (J.A. 333-334, 476).

Kaiser affiants also stated that Kaiser's purchases of coal from Mid-Continent had been common knowledge in the coal industry for some time (J.A. 334-335, 467), that they were specifically known to certain UMW officials, including former UMW President and fund trustee Anthony Boyle, and that Union officials frequently had asked both Kaiser and the United States Steel Corporation to stop making such purchases (J.A. 467-468, 470-471).

Kaiser affiants further stated that the purchase-of-coal clause was not taken into account in computing the needs and revenues of the UMW trust funds during the negotiation of the 1974 Agreement (J.A. 463-465, 471); nor was any attempt even made to calculate the difference between UMW and non-UMW wages and benefits (J.A. 464, 471). Rather, the affiants traced the origin of the purchase-of-coal clause to prior "no subcontracting" clauses that were contained in UMW contracts from 1941 to 1958 (J.A. 477, 483) and to a protective wage clause that was adopted in 1958, pursuant to which the operators agreed that all coal "procured or acquired by them or any of them under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract" (J.A. 485; accord, J.A. 477). These provisions were omitted in 1964, when the purchase-of-coal clause was first adopted (J.A. 477). According to Kaiser's affiants, the new clause was intended to deter UMW signatories from purchasing coal produced by employers who were not UMW signatories by increasing the total cost of the non-UMW signatories' coal, thereby putting economic pressure on the latter to recognize the UMW as the bargaining representative of their employees (J.A. 334-336, 470-471, 477-478). The steel company members of the BCOA were able to negotiate an exception for themselves from the purchase-of-coal clause until 1971, when, following a strike, they agreed to its inclusion in their agreement with the UMW (J.A. 471-472, 478-479). Kaiser apparently became sub-

ject to the clause when it joined the BCOA in 1974 (J.A. 480).

The trustees submitted affidavits by various individuals intended to show that Kaiser's evidence did not contain sufficient details to prove either that Kaiser needed the particular grade of coal produced by Mid-Continent (J.A. 643-646) or that Mid-Continent's employees received wages and benefits equivalent or superior to those provided by the UMW contract (J.A. 610-618, 640-642). They also denied knowing of Kaiser's purchases from Mid-Continent until near the end of the term of the 1974 Agreement, pointing out that Arnold Miller had replaced Anthony Boyle as president of the UMW by 1973 (J.A. 181-182, 630-631).

The trustees' affiants further asserted that the purchase-of-coal clause served dual purposes, namely, "to preserve the work and work standards of employees of signatories" and "to ensure that [the UMW's] trust funds maintained their ability to provide benefits whether or not signatory employers produced coal themselves or purchased coal from other coal producers," and that it "was not designed as a tool to promote UMWA organizing efforts" (J.A. 571; accord, J.A. 628-629, 636-637). While agreeing that the clause was a substitute for the 1958 protective wage clause and the prior prohibitions on subcontracting, the trustees explained that both the earlier provisions and the current one are justified by the historical practice of signatory employers' contracting out work to non-signatories in order to take advantage of the non-signatories' lower labor costs (J.A. 568-569, 572).[3] They

---

[3] The purchase-of-coal clause itself has evolved over the years. The original clause, which was contained in the 1964 Agreement, required a payment of 80¢ per ton on purchased coal and 40¢ per ton on coal produced by signatories (J.A. 570, 589). In 1971, when the purchase-of-coal clause was amended to provide for increases in contributions on produced coal from 60¢ per ton for the first year of the agreement to 80¢ per ton for the final six months of the agreement, provision also was made for a constant 40¢ per ton

produced evidence of lower average wages, fringe benefits, and mine safety expenditures in non-UMW mines (J.A. 572-575, 629), and stated that payments under the purchase-of-coal clause were intended to approximate the difference between UMW and non-UMW labor costs, although the data necessary to calculate the difference precisely were unavailable (J.A. 575, 638-639). They also stated that contributions to be made under the clause were taken into account in calculating the revenue needs of the funds (J.A. 640). Finally, they stated that in 1974 signatory employers produced approximately 65% of the bituminous coal mined in this country, that the number and production of non-signatories have increased since 1974, that the non-signatories have markets for their coal other than signatory employers (J.A. 575), and that "[t]he purchase-of-coal clause has not forced non-signatory employers to become signatory employers or to go out of business" (J.A. 576).

3. On this record, the district court granted summary judgment for the trustees (Pet. App. 80a). (Accordingly, Kaiser is entitled to have its version of the facts set forth above accepted by this Court; *Bishop* v. *Wood*, 426 U.S. 341, 347 (1976).)[4]

The district court first rejected Kaiser's defense that the purchase-of-coal clause was unenforceable because it violated the antitrust laws. Characterizing "[t]he general rule emerging from *Kelly* [v. *Kosuga*, 358 U.S. 516 (1959), as the notion] that a contract should be enforced

---

premium on purchased coal for the duration of the contract (J.A. 570, 593). Finally, in 1974, when the collective bargaining agreement that is involved in this case was executed, the payments on purchased coal were made equivalent to those on produced coal so that the clause "could not be construed under any circumstances to constitute a 'penalty'" (J.A. 629; see also J.A. 571).

[4] Kaiser, however, does not dispute any of the facts contained in the trustees' "Statement of Material Facts as to Which There is No Genuine Issue" (A. 69-73), which was filed in support of their motion for summary judgment in the district court (see Pet. Br. 2 n.2).

whether or not it fosters illegal ends, unless the alleged illegality is of such a character that enforcement of the contract would 'make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act.'" (Pet. App. 75a, quoting 358 U.S. at 520), the court held that the present case, in which the trustees sought to recover "one component of agreed compensation pursuant to the terms of a contract which has expired," did not come within the narrow exception contemplated by the Court in *Kelly* (Pet. App. 77a).

The district court also rejected Kaiser's contention that the purchase-of-coal provision was "void and unenforceable" as a "hot cargo" provision under Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), on the ground (Pet. App. 77a) that "when an activity is arguably subject to Section 8 of the National Labor Relations Act, federal courts must defer to the exclusive competence of the NLRB."

4. The court of appeals affirmed, with one judge dissenting (Pet. App. 1a-67a). As had the district court, the court of appeals held (Pet. App. 12a):

> The pith of *Kelly* is that the illegality of the ends being sought is not the measuring stick for deciding whether the contract should be enforced; only if the enforcement "would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act," can a court refuse to enforce the contract. 358 U.S. at 520.

It characterized (Pet. App. 13a) the payment of royalties on purchased coal as "part of the overall compensation" under a labor contract that already had been fully performed by the employees, as a *quid pro quo* constituting "an intelligible economic transaction in itself," and not a restraint forbidden by the Sherman Act. The court refused to consider the history and alleged ultimate purpose of the clause, holding that "[s]uch an exploration into the purported anticompetitive purpose of a contract clause is precisely what *Kelly* disallows" (*ibid.*).

The court of appeals also invoked considerations of equity and relative fault, holding (Pet. App. 15a-17a) that Kaiser should not be allowed to defend on the basis of the illegality of a contract to which it was a party against claims by the trustees, who were merely representatives of innocent third party beneficiaries. It deemed this principle particularly applicable to the present case, because of "the concern of federal labor policy to protect union members and their families from the actionable wrongs of their union representatives," citing *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960) (Pet. App. 17a). Finally, it characterized (*ibid.*) Kaiser's apparent concealment of its coal purchases as "an effort to confound the collective bargaining process and manipulate the judicial process instead," by depriving the UMW of its right to negotiate a substitute pension contribution clause, by failing to take the initiative in seeking a judicial resolution, and by "using the courts in an effort to circumvent what [it had] freely bargained for * * *" (*id.* at 19a).

Also like the district court, the court of appeals refused to adjudicate the purchase-of-coal clause's legality under Section 8(e) of the NLRA, 29 U.S.C. 158(e), because "the primary enforcement mechanism for section 8(e) violations is through the Labor Board" (Pet. App. 20a) and because "[t]o permit an employer to assert a section 8(e) defense in a suit like this would add the remedy of contract avoidance to the other forms of relief which the statute expressly provides" (Pet. App. 22a). It held that the "unenforcible [*sic*] and void" language of Section 8(e) does not create "an independent remedy available at all times and against all parties," (Pet. App. 22a), but "simply * * * prevent[s] a union from obtaining specific performance of a 'hot cargo' clause" or "compelling through judicial enforcement of collective bargaining agreements the very conduct that the union could not compel by its economic might" (*id.* at 23a) under Section 8(b)(4), 29 U.S.C. 158(b)(4).

Finally, the court held (Pet. App. 34a) that an action for delinquent contributions could be maintained under Section 502 of ERISA, 29 U.S.C. 1132, as well as under Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. 185, and that the district court's award of attorneys' fees was proper under 29 U.S.C. 1132(g).

Judge Wilkey dissented on the ground (Pet. App. 39a-47a) that in this case, unlike in *Kelly*, *supra*, the contractual provision under which the trustees sought payment was the very one that Kaiser alleged was illegal, and that therefore requiring payment would give effect to an alleged illegal boycott and infringe Kaiser's legally protected interests. He perceived no "windfall" for Kaiser in its nonperformance (Pet. App. 47a-48a), nor, on the undisputed facts, any inequity in denying enforcement (Pet. App. 49a-52a). He also stated his view (Pet. App. 58a-65a) that the courts have jurisdiction to deny enforcement of contracts violating Section 8(e) of the NLRA where the statute is raised as a defense. Finally, Judge Wilkey would have reversed the award of attorneys' fees under Section 502(g) of ERISA, 29 U.S.C. 1132(g), on the ground (Pet. App. 66a-67a) that Section 502(a)(3), 29 U.S.C. 1132(a)(3), authorizes actions by fiduciaries only for a violation either of ERISA itself or of a benefit plan, whereas Kaiser's alleged violation of its collective bargaining contract was neither.

5. Nine days after the court of appeals rendered its decision in this case, Congress enacted the Multiemployer Pension Plan Amendments Act of 1980 (the "1980 Amendments"), Pub. L. No. 96-364, 94 Stat. 1208 *et seq.* Section 306(a) of the Amendments, 94 Stat. 1295, added a new section to ERISA, which is entitled "Delinquent Contributions" and which provides:

> Sec. 515. Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent

not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.[5]

Section 108(c)(1) of the 1980 Amendments, 94 Stat. 1267, made Section 306 effective "on the date of enactment of [the 1980 Amendments]," *i.e.*, September 26, 1980.

Kaiser filed its petition for a writ of certiorari on February 10, 1981.

SUMMARY OF ARGUMENT

I

A. Congress exhibited its special solicitude for the financial integrity of multiemployer pension and welfare plans by establishing, in the Multiemployer Pension Plan Amendments Act of 1980, a special rule narrowly restricting the availability of illegality defenses to actions for delinquent contributions brought by trustees of multi-

---

[5] Section 306(b), 94 Stat. 1295, added the following to Section 502(g) of ERISA, 29 U.S.C. 1132(g):

> (2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan--
>
> (A) the unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of—
>
> (i) interest on the unpaid contributions, or
>
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
>
> (E) such other legal or equitable relief as the court deems appropriate.
>
> For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or if none, the rate prescribed under Section 6621 of the Internal Revenue Code of 1954.

employer plans. Section 306(a) of the Amendments imposes a duty on every employer to make contractually prescribed payments "to the extent not inconsistent with law." In our view, this provision, construed in light of its legislative history, requires that *all* prescribed payments must be made so long as the making of the payment—in and of itself—is not unlawful.

A central concern of Congress in enacting the 1980 Amendments was to maintain the economic soundness of employee pension and welfare funds. Congress noted, *inter alia*, that contribution delinquencies were a major problem for most multiemployer plans, that the costs of collection adversely affect the financial health of plans, and that nonpayment by some employers lowers the benefits for participant employees and raises the contribution rates of employers who do pay. In particular, Congress decried the unnecessary complexity and costliness of what should have been simple collection actions. Indeed, the only provision the legislators mentioned as a possible defense to an action by fund trustees for delinquent contributions is 29 U.S.C. (& Supp. III) 186, a provision that renders the making of a payment by an employer to a representative of its employees in and of itself unlawful. This history strongly indicates that the only illegality defenses Section 306(a) would permit are those that are based on illegality in the very making of the payment itself.

Under this standard, neither of Kaiser's proffered defenses could be raised, because both are based not on any illegality in the making of the payment itself, but rather solely on the collective bargaining agreement context out of which the payments arise. Moreover, Congress expressed specific approval of a pre-amendment decision holding precisely the same statutory defenses unavailable as defenses to a suit for delinquent contributions.

B. The 1980 Amendments, which became effective upon their enactment nine days after the decision of the court below, are fully applicable to this case. In *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974), this

Court held that an appellate court is bound to "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Neither the language nor the legislative history of Section 306(a) suggests that the provision was not intended to apply to future cases. Nor would the application of Section 306(a) in this case result in "injustice," "manifest" or otherwise. The issue presented here is unquestionably one of "great national concern" (*Bradley, supra*, 416 U.S. at 719, quoting *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)). In such cases, the rule of law in effect at the time of the decision on review is to be applied even at the expense of "the vested rights of * * * citizens" (*The Schooner Peggy, supra*, 5 U.S. (1 Cranch) at 110). In any event, there is no vested right to raise an illegality defense. This Court has noted (*Kelly* v. *Kosuga*, 358 U.S. 516, 519 (1959), quoting *McMullen* v. *Hoffman*, 174 U.S. 639, 669 (1899)) that an illegality defense "is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions." A party who signs a contract with an intent to plead its illegality after receiving its benefits thus does so at the risk that the legislative perception of the public interest might change. Finally, the application of Section 306(a) to this case imposes no unforeseeable liability on Kaiser, since Kaiser all along has known that it is a party to a contract that expressly imposes on it the very obligations that it is now attempting to avoid.

II

Section 306(b) unequivocally provides for the award of attorneys' fees to fiduciaries who prevail in an action brought under the 1980 Amendments. There is no suggestion in the statute's language or its legislative history that it was not meant to apply to cases that were pending on the date of its enactment. Moreover, because at-

torneys' fees are awarded only to *prevailing* fiduciaries, the question is simply one of allocating the costs of litigation between an employer and the corpus of a pension and welfare trust fund for its employees and their beneficiaries, from which the employer has been found to have wrongfully withheld agreed-upon contributions. Accordingly, no "manifest injustice" would result from the application of Section 306(b).

ARGUMENT

I. APPLICABLE LAW PRECLUDES KAISER FROM RAISING THE DEFENSE OF ILLEGALITY UNDER THE ANTITRUST LAWS OR SECTION 8(e) OF THE NLRA IN THIS ACTION BY TRUSTEES OF PENSION AND WELFARE FUNDS

As is shown by the decisions below, prior to the enactment of the 1980 Amendments, the question whether, in an action for delinquent contributions by trustees of a multi-employer plan, an employer could raise as a defense the alleged illegality of the agreement or plan calling for the contributions was controlled largely by the same legal rules that governed the availability of the defense of contract illegality in any type of suit: Resolution of the issue required a determination whether the case fit within the exception recognized in *Kelly* v. *Kosuga*, 358 U.S. 516 (1959).[6] In general terms, an employer would be permitted to raise an illegality defense only if it could place itself outside the general policy " 'of preventing people from getting other people's property for nothing when they purport to be buying it' " (358 U.S. at 520-521, quot-

[6] While the courts below disallowed Kaiser's antitrust illegality defense on the basis of *Kelly* v. *Kosuga*, they based their refusal to adjudicate the alleged Section 8(e) violation on what they found to be exclusive NLRB jurisdiction of such matters. *Kelly's* analysis of the availability *vel non* of illegality defenses, however, would appear to apply not only to antitrust violations, but to violations of other laws as well, including the labor laws.

ing *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U.S. 227, 271 (1909) (~~1909~~) (Holmes, J., dissenting)), and within the narrow exception for cases "where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act * * *" (358 U.S. at 520).[7]

---

[7] See also *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 756 (1947) (footnote omitted) ("[i]f, in order to prove his own case, a plaintiff proves his violation of law, then no court will aid the plaintiff to recover"); *Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 252 (1925) ("[i]t is only where the invalidity is inherent in the contract that the [Anti-Trust] Act may be interposed as a defense"); *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U.S. 165, 172 (1915) ("whether the contract of sale was inherently illegal so as to bring it within the * * * elementary rule that courts will not exert their powers to enforce illegal contracts or to compel wrong-doing"); *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, *supra*, 212 U.S. at 261 ("[i]f judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination"); *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 547 (1902) ("[t]he plaintiff's cause of action is in no legal sense dependent upon, or affected by the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon in this action to enforce any contract tainted with illegality, or contrary to public policy"); *McMullen* v. *Hoffman*, 174 U.S. 639, 654 (1899) ("no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract").

This is not to suggest, however, that in cases decided prior to the 1980 Amendments courts were not influenced by the unique and sympathetic posture of trustees of pension and welfare funds or that such considerations could not be, or were not, taken into account by courts in making the less than precise determination called for by *Kelly*. See *Huge* v. *Long's Hauling Co.*, 590 F.2d 457, 459 (3d Cir. 1978), cert. denied, 442 U.S. 918 (1979); *id.* at 462-466 (Adams, J., concurring); cf. *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960); and discussion at pages 25-28 and notes 18-19, *infra*.

In Section 306(a) of the 1980 Amendment, 94 Stat. 1295, however, Congress established a special rule governing the availability of illegality defenses in actions for delinquent contributions brought by trustees of multiemployer plans. We submit that, in doing so, Congress intended Section 306(a) to preclude a defendant-employer, in a suit by trustees for delinquent contributions, from raising the types of defenses that Kaiser has attempted to raise in this case.[8]

A. Section 306(a) of the 1980 Amendments Precludes the Raising of Kaiser's Illegality Defenses

1. *Section 306(a) makes an employer liable for all prescribed contributions except those the very making of which would itself be unlawful*

a. *The Statutory Language.* Section 306(a) of the 1980 Amendments, 94 Stat. 1295, provides (emphasis added):

> Delinquent Contributions
>
> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, *to the extent not inconsistent with law*, make such contributions in accordance with the terms and conditions of such plan or such agreement.

In view of the previous case law's various formulations of the illegality defense (see note 7, *supra*), it might be suggested that the statute releases employers from ERISA liability whenever the making of the required contribution would "*bring about* 'the precise conduct' [condemned] by * * * law" (Pet. Br. 9; emphasis added) or "permit a party to *reap the fruits* of illegal contract provisions * * *" (Pet. Br. 10; emphasis added). Neither

---

[8] To the extent that any other implication might otherwise arise from the "unenforceable and void" language of Section 8(e), the more recent legislation must, of course, prevail.

of these constructions is readily suggested by the statutory language, however. The statute contains no exemption for payments that cause or result in a state of affairs that is "inconsistent with law;" nor does it refer to payments that reward past illegal conduct. Rather, the phrase "not inconsistent with law" appears to modify the verb phrase "shall * * * make such contributions," suggesting that only when the very act of making the payment itself is unlawful will an employer's failure to make agreed-upon contributions be exempt from ERISA liability. Accordingly, we submit that the most reasonable construction of this statutory language is that an employer will be subject to liability under ERISA for *any* failure to make contributions called for by a collective bargaining agreement or trust agreement establishing a multiemployer plan unless *the very making of the payment itself* is unlawful, such as payments made in violation of 29 U.S.C. (& Supp. III) 186 (see discussion at page 23 & note 15, *infra*).

b. *The Legislative History.* The relevant legislative history also supports this construction of the statute.

(1) Congress enacted ERISA, 29 U.S.C. 1001 *et seq.*, in September 1974, for the purpose of protecting employees and other beneficiaries of private pension and welfare plans. To that end, ERISA establishes minimum standards of plan administration, vesting of plan benefits and fiscal responsibility, and provides for the insurance of vested plan benefits against the risk of premature plan termination. See H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 1-2 (1973). The statute requires that benefit plans be fully funded over a period of years (29 U.S.C. 1081-1086), and prohibits the trustees, who are to administer the funds in the interests of the beneficiaries with "care, skill, prudence, and diligence" (29 U.S.C. 1104(a)(1)(B)), from extending credit to participating employers (29 U.S.C. 1106(a)(1)(B)). The Departments of Labor and the Treasury, which administer ERISA, have construed these provisions as requiring the trustees to make "rea-

sonable, diligent and systematic" efforts to collect delinquent contributions, including, when necessary, "the institution of various forms of appropriate legal action." *Prohibited Transaction Exemption 76-1*, 41 Fed. Reg. 12740, 12741 (1976); accord, Department of Labor Advisory Opinion 78-28A (Dec. 5, 1978), *reprinted in* Pens. Rep. (BNA) No. 221 at R-25 (Jan. 8, 1979). See *Huge* v. *Old Home Manor, Inc.*, 419 F. Supp. 1019, 1020-1021 (W.D. Pa. 1976); cf. *Nedd* v. *United Mine Workers*, 556 F.2d 190, 210-212 (3d Cir. 1977), cert. denied, 434 U.S. 1013 (1978).[9]

Shortly after ERISA's enactment, it became apparent that application of the statute to multiemployer plans

---

[9] *Prohibited Transaction Exemption 76-1, supra*, 41 Fed. Reg. 12741 (1976), provides:

> [G]enerally neither the failure of a participating employer in a multiple employer plan to make a contribution to the plan when the contribution is due nor the failure of the plan to collect such a delinquent contribution constitutes a prohibited transaction under section[s] 406 and 407(a) of the Act, [94 Stat. 1303,] and section 4975(c)(1) of the [Internal Revenue] Code [(26 U.S.C.)]. However, if the plan is not making systematic, reasonable and diligent efforts to collect delinquent contributions, or the failure to collect is the result of an arrangement, agreement or understanding, express or implied, between the plan and the delinquent employer, such failure to collect a delinquent employer contribution may be deemed to be a prohibited transaction.

Because, under the vesting provisions of ERISA, 29 U.S.C. 1053, an employee who puts in a period of covered service receives credit toward his benefits even if his employer fails to make contributions, the trustees' failure to make "reasonable, diligent and systematic" collection efforts could result in a failure to comply with the statutory funding requirements. Advisory Opinion 78-28A, *supra*. For any reason other than an employer's inability to pay, the trustees' obligation to collect can be relieved only by a written agreement between the employer and the sponsoring union. *Prohibited Transaction Exemption 76-1, supra*, 41 Fed. Reg. 12742 (1976); see 29 U.S.C. 1186(c)(5)(B); *Lewis* v. *Seanor Coal Co.*, 382 F.2d 437, 441-444 (3d Cir. 1967), cert. denied, 390 U.S. 947 (1968).

Supp III

presented difficulties in recovering delinquent contributions from employers. See, *e.g.*, *Prohibited Transaction Exemption 76-1, supra*, 41 Fed. Reg. 12741-12742 (1976). Theodore Groom testified on behalf of the Western Conference of Teamsters Pension Trust Fund (*Oversight of ERISA, 1977: Hearings on S. 2125 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 391 (1977)) that

> [t]he most significant, and the oldest, day-to-day problem faced by multiemployer plans is the timely collection of contributions owed the plan by employers under the bargaining agreements they have negotiated with local unions. The issue of employer delinquencies is an important one for the simple reason that employer contributions are the lifeblood of the fund.

He particularly noted (*id.* at 391-393) that no effective federal remedy was available for use by the trustees against delinquent employers,[10] that the trust funds incurred substantial administrative and legal expenses in collecting delinquent accounts, that some courts refused to enforce contractual provisions for attorneys' fees and liquidated damages and that, if a delinquent employer became insolvent, the trust funds enjoyed no priority in bankruptcy proceedings.[11] Groom recommended, *inter*

---

[10] At the time Groom testified, there was only one published decision upholding federal jurisdiction pursuant to Section 502 of ERISA, 29 U.S.C. 1132, in an action by trustees of a multiemployer plan for contributions due under a collective bargaining agreement (*Huge* v. *Old Home Manor, Inc., supra*), and its theory was unclear.

[11] Accord: *Multiemployer Pension Plan Amendments Act of 1979: Hearings on S. 1076 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 523 (1979); *The Multiemployer Pension Plan Amendments Act of 1979: Hearing on H.R. 3904 Before the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 193 (1980); *Multiemployer Pension Plan Termination Insurance Program: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 121-122 (1979); *The Multiemployer Pension Plan*

alia, "[a]mending the enforcement provisions of ERISA to declare that provisions in plan documents requiring the payment of liquidated damages * * * and reasonable attorneys' fees with respect to delinquent contributions under collective bargaining agreements shall be enforceable without regard to other state or federal law" (*id.* at 394).[12]

(2) While previous discussions concerning the problem of delinquent employer contributions and the concomitant cost of litigation by fund trustees had not focused specifically on the defenses that could be raised by employer defendants,[13] by 1980 intervening litigation

---

Amendments Act of 1979: Hearings on H.R. 3904 Before the Task Force on Welfare and Pension Plans of the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor, 96th Cong., 1st Sess. 772, 808 (1979).

[12] In a subsequent statement, Groom pointed out that employers sometimes used payment delays as the equivalent of low or no cost loans, and recommended a statutory provision requiring enforcement of reasonable liquidated damages clauses as an incentive for prompt payment. *ERISA Improvements Act of 1979: Hearings on S. 209 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 592-593 (1979).

[13] But see testimony of Groom, *supra*, to the effect that payment of liquidated damages and attorneys fees should be required "without regard to other state or federal law."

The operative language of Section 306(a) and (b) of the 1980 Amendments first appeared in Sections 262 and 271 of S. 3017, 95th Cong., 2d Sess. (1978). Sections 262 and 271 of S. 3017 were carried over in the next Congress in Sections 154 and 153 of S. 209, 96th Cong., 1st Sess. (1979). None of the commentary on these earlier bills suggests that the legislators considered whether the provision would do anything beyond requiring employers to make agreed-upon contributions "in accordance with applicable law." *ERISA Improvements Act of 1978: Joint Hearings on S. 3017 Before the Subcomm. on Labor of the Senate Comm. on Human Resources and the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the Senate Comm. on Finance*, 95th Cong., 2d Sess. 123, 183, 364, 419, 1452-1453 (1978); *ERISA Improvements Act of 1979: Hearings on S. 209 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 106, 200, 589-594, 624-625 (1979).

had sharply defined the dimensions of that issue.[14] Hence, the sponsors of S. 1076, 96th Cong., 1st Sess. (1979), and H.R. 3904, 96th Cong., 1st Sess. (1979), which became the Multiemployer Pension Plan Amendments Act of 1980, addressed the question directly.

When introduced in Congress during the spring of 1979, neither H.R. 3904, *supra*, nor its Senate companion bill, S. 1076, *supra*, contained any provision concerning delinquent employer contributions. The first Senate committee to consider S. 1076, the Senate Committee on Labor and Human Resources, amended it to include, *inter alia*, a Section 308, entitled "Delinquent Contributors," which contained substantially the same language (see App. A, *infra*, 2a-3a) eventually enacted as Section 306 of the 1980 Amendments. Staff of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *The Multiemployer Pension Plan Amendments Act of 1980, S. 1076: Summary and Analysis of Consideration*, 242-243 (Comm. Print 1980) (hereinafter "*Comm. Print*").

After noting (*Comm. Print* 43-44) that employer contribution delinquencies were "a serious problem for most multiemployer plans," that the costs of collection "adversely affect the financial health of plans," and that nonpayment by some employers lowers the benefits for participants and raises the contribution rates for employers who do pay, the Committee described the thrust of its amendment concerning delinquent contributions as being to simplify and expedite the collection process by removing from it considerations extraneous to the ques-

---

[14] See *Waggoner* v. *McGray*, 607 F.2d 1229 (9th Cir. 1979); *Huge* v. *Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), cert. denied, 442 U.S. 918 (1979); *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.*, 488 F. Supp. 816 (D.D.C. 1980); *Western Washington Laborers-Employers Trust Fund* v. *McDowell*, 103 L.R.R.M. 2219 (W.D. Wash. 1979). The district court decision in this case was entered on March 9, 1979. 466 F. Supp. 911 (D.D.C.).

tion whether the employer had made a promise to pay (*id.* at 44; emphasis added):

> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. *Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions.* This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.
>
> The public policy of this legislation to foster the preservation of the private multiemployer plan system mandates that provision be made *to discourage delinquencies and simplify delinquency collection.*

This theme was reiterated and clarified in statements made in their respective chambers by Representative Thompson, Chairman of the House Education and Labor Committee, and Senator Williams, Chairman of the Senate Committee on Labor and Human Resources—the floor managers of H.R. 3904, *supra.* During floor consideration of H.R. 3904 in the House, Representative Thompson explained (126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980); emphasis added):

> Because delinquencies of employers in making required contributions are also a serious problem for many multiemployer plans, we wish to make clear the public policy in this area, which this bill is intended to further. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time.

> Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys' fees and other legal costs arise in connection with collection efforts.
>
> These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability for all employers.
>
> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, *and without regard to issues which might arise under labor-management relations law—other than 29 U.S.C. 186.* Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.

Accord, 126 Cong. Rec. S11673 (daily ed. Aug. 26, 1980) (remarks of Sen. Williams) (emphasis added) ("[f]ederal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and *without regard to issues which might arise under labor-management relations law (other than 29 U.S.C. 186)*). See also 126 Cong. Rec. S10102 (daily ed. July 29, 1980) (remarks of Sen. Williams).

This legislative history strongly supports the construction of the statute suggested at pages 15-16 above—that

an employer will be liable for *all* contributions called for by a multiemployer plan or collective bargaining agreement except those *the very making of which* itself is unlawful. The committee that added the delinquent contributions provision to the 1980 Amendments and the floor sponsors of the legislation made clear that Congress's intent was to streamline the collection process by eliminating from it considerations "unrelated to" or "extraneous to" the employer's promise to pay and the plan's entitlement to the contributions; the Act's sponsors defined the only relevant considerations as those raised by 29 U.S.C. (& Supp. III) 186. The identifying feature of Section 186, however, is that it declares unlawful the very making of a payment itself—*i.e.*, the simple passage of money from the employer to any of the prohibited payees listed in 29 U.S.C. (& Supp. III) 186.[15] The statements made by the floor managers of the amendments thus demonstrate a clear legislative intent that the only type of contributions that would be exempt from liability under ERISA by Section 306(a) would be payments the very making of which itself is unlawful—payments such as those that are prohibited by 29 U.S.C. (& Supp. III) 186.

Permitting employers to raise illegality defenses based on 29 U.S.C. (& Supp. III) 186 makes sense with respect to both fairness to the parties and judicial administration.

---

[15] Section 186 makes unlawful *the very payment, loan or delivery* of "money or other thing of value" by any employer or association of employers to any representative of any of its employees, to any labor organization that represents or seeks to represent any of its employees, to any employee or group or committee of employees in excess of their normal compensation for the purpose of causing them to influence any other employees in the exercise of their right to organize and bargain collectively through representatives of their own choosing, or to any officer or employee of a labor organization with the intent to influence his or her actions, decisions or duties as a representative of employees or as an officer or employee of a labor organization, except for, *inter alia*, payments made to trust funds like those involved in the present case.

Section 186(c)(5) sets out the rules governing the administration of employee pension and welfare trust funds.[16] Hence, no defense could be less "unrelated" or "extraneous" to an employer's promise to pay or a plan's entitlement to contributions. Moreover, because the trustees bear the responsibility of administering the funds and have the most first-hand knowledge concerning that administration, they are appropriate parties against whom a Section 186(c)(5) illegality defense should be directed. Cf. *Huge* v. *Long's Hauling Co.*, 590 F.2d 457, 465 (3d Cir. 1978) (Adams, J., concurring), cert. denied, 442 U.S. 918 (1979).[17]

(3) By its respective endorsement and rejection of two pre-1980 Amendments lines of case law, Congress also made explicit the policy considerations that it viewed as requiring such a stringent construction of the statute (126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) (re-

---

[16] Subsection (c)(5) requires (A) that the employer's payments be held in trust for the purpose of making medical, pension, compensation or insurance payments for the benefit of employees and their families and dependents; (B) that the detailed basis on which such payments are to be made be specified in a written agreement with the employer and that the employers and employees be equally represented in the administration of the fund; and (C) that such payments as are intended to be used for providing pensions or annuities be paid to a separate trust.

[17] One court of appeals has held, however, that not *every* violation of 29 U.S.C. (& Supp. III) 186 will be an adequate defense to an ERISA claim for delinquent contributions. In *National Stabilization Agreement of the Sheet Metal Industry Trust Fund* v. *Commercial Roofing & Sheet Metal*, Nos. 78-1761, 78-2071 (D.C. Cir. May 4, 1981), the court held that an employer's claim that a joint labor-management trust fund violated the "equal representation" requirement of 29 U.S.C. (Supp. III) 186(c)(5)(B) was not an adequate defense to a collection suit under Section 502 of ERISA, 29 U.S.C. 1132, for delinquent contributions because, "[u]nlike other defects [under 29 U.S.C. 186] such as the absence of a written agreement, or the absence of a detailed basis for employer payments, an equal representation defect does not practically preclude continued employer contributions" (slip op. 19 (footnote omitted)).

marks of Rep. Thompson); accord, *id.* at S11673 (remarks of Sen. Williams):

> [W]e endorse judicial decisions such as *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962); and *Huge* v. *Long Hauling Company, Inc.*, 590 F.2d 457 (3d Cir. 1978) [, cert. denied, 442 U.S. 918 (1979)]. Cases such as *Western Washington Laborers-Employers Health and Security Trust Fund* v. *McDowell* * * *, 103 LRRM 2219 (W.D. Wash., 1979) and *Washington Area Carpenters Welfare Fund, et al.* v. *Overhead Door Company*, [488 F. Supp. 816 (D.D.C. 1980)], are considered to have been incorrectly decided and this legislation is intended to clarify the law in this respect by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.

In *Lewis* v. *Benedict Coal Corp.*, *supra*, which construed a prior UMW pension and welfare trust fund, this Court emphasized the strong public policy in favor of maintaining the integrity of multiemployer pension and welfare trust funds (361 U.S. at 468-469):

> It is a commonplace of modern industrial relations for employers to provide security for employees and their families to enable them to meet problems arising from unemployment, illness, old age or death. While employers in many other industries assume this burden directly, this welfare fund was jointly created by the coal industry and the union for that purpose. * * *
>
> Moreover, unlike the usual third-party beneficiary contract, this is an industry-wide agreement involving many promisors. If [the employer] and other coal operators having damage claims against the union for its breaches may curtail royalty payments, the burden will fall in the first instance upon the employees and their families across the country.

In *Huge* v. *Long's Hauling Co.*, *supra*, which involved the same statutory defenses as the present case, Chief Judge Seitz, who announced the judgment of the

court, noted the special status that this Court and the lower courts have accorded the trustees of employee welfare and pension funds (590 F.2d at 459):

> [C]ourts have been extremely reluctant to recognize any defense to an employer's promise to pay into a pension fund. The trustees of the fund, although technically third-party beneficiaries, often can avoid contractual defenses that could be asserted against the union itself. *See Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 * * * (1960).[18]

Judge Adams concurred in the judgment in *Long's Hauling* on the ground that in an action by trustees of a multiemployer welfare or pension fund to compel an employer to make contributions prescribed in a collective bargaining agreement the employer may not assert *any* defenses it may have to that contract.[19] He also noted

---

[18] Accord, *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F.2d 552, 557 (6th Cir. 1962) ("[*Lewis* v. *Benedict Coal Corp., supra,*] has now placed collective bargaining contracts in a special class, exempt from some of the rules of construction traditionally applicable to contracts").

[19] In his opinion announcing the judgment of the court, Chief Judge Seitz prohibited an employer from defending against an action brought by trustees of the UMW Health and Retirement Funds for contributions required by a collective bargaining agreement on the ground that Article II of the agreement, which provided (590 F.2d at 458) that "'[t]he transportation of coal * * * may be contracted out only to a contractor employing members of the UMWA under this Agreement,'" violated the Sherman Act and Section 8(e) of the NLRA. As discussed in the text above, Judge Adams concurred in the judgment. Judge Rosenn dissented on the narrow ground (590 F.2d at 466-467) that, in a suit by trustees of a multiemployer pension fund, an employer that is already under an obligation to contribute, and that does contribute, to a private pension fund for its employees may raise defenses that it has no duty *also* to pay the trustees on behalf of those same employees. In such circumstances, Judge Rosenn explained (590 F.2d at 469), "[e]mployees are not likely to suffer privation from the successful interposition of the defense * * * since the employer will have contributed to a private fund, as negotiated by the union, to which the employees have given their approval in a valid contract."

the courts' solicitude for such funds, and suggested some of the reasons for it (590 F.2d at 464-465; footnotes omitted):

> The wisdom of not permitting employers such as Long to interpose defenses to their undertaking to support union welfare and pension funds seems apparent. With both the number of Americans in retirement and the duration of those non-remunerated years of their lives increasing, and with the cost of health care soaring, it has become ever more important to provide for those situations where the cost of living will no longer be satisfied from anticipated income. Social security benefits are often insufficient by themselves to meet those needs, and must be supplemented from other sources. For millions of unionized employees, the chosen and preferred method for insuring against the privations of sickness, unemployment, and old age has been the union welfare and pension funds. Under such arrangements, the employer contributes periodically to the funds an amount negotiated by contract. Such contributions are, in reality, indirect or deferred compensation, earned by the employee with each hour or each day worked. Ensuring the viability of these funds and protecting the employees' investment from dissipation as a result of union or employer conduct or misconduct has for many years been a concern of the federal government, and has recently received renewed attention.
>
> As [*Lewis* v. *Benedict Coal Corp.*] makes clear, vital public interests are served by insulation of the employer's obligations to union welfare and pension funds form [*sic*] under the labor contract. It prevents penalizing employees for alleged union misdeeds over which they have little, if any, control. And it guarantees hard-working people the unemployment, health and retirement protections that they and their families expect to receive as part of the terms of their employment.

Judge Adams also noted (590 F.2d at 463 n.2) that "frequent litigation of such disputes would have a deleterious effect upon the pension funds, in that counsel fees

for the trustees would have to be paid from their accounts, and may affect the ability of the funds to provide the benefits they were designed to provide."

To be sure, none of those cases involved the enforcement of a contribution clause that itself was alleged to violate the law.[20] Nevertheless, the cases involved the same basic policy judgment present here. Moreover, both decisions that Congress disapproved (*Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.*, 488 F. Supp. 816 (D.D.C. 1980), and *Western Washington Laborers-Employers Trust Fund* v. *McDowell*, 103 L.R.R.M. 2219 (W.D. Wash. 1979)) had permitted as a defense the argument that, because the agreement calling for contributions was only a prehire agreement (see 29 U.S.C. 158(f)), which the employer could abrogate if the union had not acquired majority status, the employer's promise to contribute contained in it was unenforceable. Congress thus expressed its desire to preclude an employer from raising even an "illegality" defense that goes to the entire agreement containing the contribution clause.[21]

---

[20] In *Lewis* v. *Benedict Coal Corp.*, *supra*, 361 U.S. at 471, the Court held that an employer could not successfully defend against a charge that it had failed to make contributions required by a collective bargaining agreement on the ground that the union also had violated the agreement—by engaging in strikes and work stoppages—unless the parties to the agreement had expressed in "unequivocal words" their intent that "the union's breaches of its promises should give rise to a defense against the duty assumed by an employer to contribute to a welfare fund meeting the requirements of § 302(c)(5)." And in *Lewis* v. *Mill Ridge Coals, Inc.*, *supra*, the Sixth Circuit relied on *Benedict Coal Corp.*, *supra*, to hold that misconduct by the trustees themselves was no defense to an action by them for contributions required by a collective bargaining agreement. In *Huge* v. *Long's Hauling Co.*, *supra*, the provision of the collective bargaining agreement on which the employer attempted to base its defense of illegality was a different provision from that which called for the contributions at issue (see note 19, *supra*).

[21] While some appellate courts have held that the absence of majority status does not preclude enforcement of the fringe benefit

We submit, therefore, that our construction of Section 306(a), disallowing illegality defenses except when the very making of the payment itself is illegal, appears to be the balance that was struck by Congress, since that interpretation furthers the remedial purposes expressed by Congress to the fullest extent permitted by the statutory language and is wholly consistent with the legislative history. Indeed, the very policy question at the heart of this case—whether the statutory defenses Kaiser seeks to raise must yield to the congressional policy of curtailing interference with the collection of contractually prescribed contributions—was addressed by Congress in its endorsement (see pages 24-28 and note 19, *supra*) of the refusal in the *Long's Hauling* case to allow precisely the same statutory defenses to be raised. The fact that in that case those defenses related to a clause of the contract other than the one prescribing the payment obligation is immaterial to the expressed policy concerns that motivated Congress to adopt the Amendments.

2. *The making of the payments required by the purchase-of-coal clause is not, in and of itself, unlawful*

As we have shown above, the only type of illegality defense permitted by the 1980 Amendments is illegality in the very making of the payment itself. Kaiser has argued that "enforcement of the purchase-of-coal clause

---

provisions of a prehire agreement in a contract action by third party beneficiaries (*Contractors, Etc.* v. *Associated Wrecking Co.*, 638 F.2d 1128 (8th Cir. 1981); *Western Washington Cement Masons Health & Security Trust Funds* v. *Hillis Homes, Inc.*, 107 L.R.R.M. 2897 (Wash. Ct. App. 1980)), Congress would preclude an employer even from raising the issue in defense to an action by fund trustees for delinquent contributions. (In *Contractors, Etc.*, the Eighth Circuit expressly noted (638 F.2d at 1130) that by holding as it did, it did not have to reach the question whether an employer may assert a union's lack of majority support as a defense to an action by a trust fund to recover unpaid contributions required by a prehire agreement.)

would have precisely the *effects* that both the antitrust laws and the labor laws are intended to prevent" (Br. 10, 15-18; emphasis added) and that it would aid the trustees in *realizing the fruits* of an allegedly unlawful agreement (Br. 18-22). Kaiser has never argued, however, that either the antitrust laws or Section 8(e) makes unlawful the payment, in and of itself, by Kaiser to the trustees.

Nor can Kaiser make that argument. If Kaiser were making a purely gratuitous payment to the trustees, neither the antitrust laws nor Section 8(e) would be involved. Rather, it is only the context in which the payments arise—the collective bargaining context—that gives Kaiser a basis for arguing that the payments are unlawful under the antitrust laws or Section 8(e). But that is not illegality in the making of the payment in and of itself.

As noted above (page 23 and note 15), 29 U.S.C. (& Supp. III) 186 is the only provision of which we are aware that makes payments from an employer to a representative of its employees *per se* unlawful. Kaiser, however, has never contended that the purchase-of-coal clause violates Section 186. Moreover, since the payments required by the purchase-of-coal clause are made for the benefit of Kaiser's own employees, the fact that the payments are computed by a standard other than those employees' work hours or Kaiser's output does not render them violative of 29 U.S.C. (Supp. III) 186(c)(5). See *Walsh* v. *Schlecht*, 429 U.S. 401 (1977).[22]

---

[22] We also disagree with Kaiser's characterization of the payments required by the present purchase-of-coal clause (which does not involve disparate payments; see note 3, *supra*) as solely a penalty imposed on Kaiser, rather than as an element of compensation to its employees, although we do not believe that distinction need be reached under the 1980 Amendments. In our view, the items of payment promised by an employer in a collective bargaining agreement cannot be so neatly compartmentalized. Rather, they make up part of a compensation "package," in ex-

B. Section 306(a) of the 1980 Amendments Is Applicable to This Case

Bradley v. *Richmond School Board*, 416 U.S. 696 (1974), involved the right of successful plaintiffs to recover attorneys' fees for services rendered prior to the effective date of a statute authorizing the payment of such fees. This Court held (*id.* at 711) that an appellate court is bound to "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." See also *Hutto* v. *Finney*, 437 U.S. 678, 694-695 n.23 (1978); *Cort* v. *Ash*, 422 U.S. 66, 76-77 (1975); *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 281-282 (1969); *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801).

Neither the language nor the legislative history of Section 306 contains any suggestion that it was not in-

---

change for which the union promises the services of its members. That this was the understanding of the parties in the present case is demonstrated by the collective bargaining agreement's provisions for negotiation of a substitute clause in the event the purchase-of-coal clause were held invalid (A. 32) and, indeed, for termination of the agreement in those circumstances (J.A. 56). To be sure, if Kaiser had made all its purchases from UMW producers and none from non-UMW producers, the funds would have received nothing under the purchase-of-coal clause, but would have received commensurately higher payments from the UMW producers, who already were obligated to contribute to the trust funds. The purchase-of-coal clause, therefore, simply assured that in either event similar contributions on the coal purchased by Kaiser, as well as that produced by Kaiser, would be made to the funds on behalf of Kaiser's employees. See generally 29 U.S.C. (Supp. III) 186(c)(5); *Walsh* v. *Schlecht*, *supra*.

Finally, Kaiser's argument (Br. 44-47) that disallowing the illegality defense raised in this case would, or at least might, "offend[] the constitutional requirement of the separation of powers" (Br. 44) has no application to the cause of action provided by Section 306(a) of the 1980 Amendments. As we have shown (pages 15-30), in defining that statutory right of action, Congress itself expressly limited the cause of action's vulnerability to illegality defenses.

tended to apply to pending cases. To the contrary, the fact that Section 108(c)(1) of the 1980 Amendments, 94 Stat. 1267, made Section 306 effective as of the date of its enactment indicates a congressional intent that Section 306 be applicable as soon as possible.

Nor would the application of Section 306(a) in this case result in "manifest injustice." See *Bradley* v. *Richmond School Board*, *supra*, 416 U.S. at 716-717; *Thorpe* v. *Housing Authority of Durham*, *supra*, 393 U.S. at 282; *The Schooner Peggy*, *supra*, 5 U.S. (1 Cranch) at 110. In *Bradley* the Court identified (416 U.S. at 717) three "concerns * * * relative to the possible working of an injustice[:] * * * (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." These concerns arise from the Court's admonition in *The Schooner Peggy*, *supra*, 5 U.S. (1 Cranch) at 110 (footnote omitted):

> [I]n mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside.

1. *Nature and Identity of the Parties.* The plaintiffs in this case are the trustees of funds accumulated for the benefit of Kaiser's employees, former employees, and their dependents. None of the intended recipients is a direct party to the allegedly illegal contract. Rather,

they are third party beneficiaries of Kaiser's unqualified promise to make contributions to the funds. Moreover, the plaintiffs in this case and the employees and beneficiaries whom they represent are members of a class toward which both the courts and Congress have expressed special solicitude, and whom Congress specifically intended to protect in the 1980 Amendments. See 29 U.S.C. 1001 *et seq.* and *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962); *Huge* v. *Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), cert. denied, 442 U.S. 918 (1979), and the discussion of those cases at pages 25-28 above.

Hence, although the disputants in this case are private parties (as were the claimants in *The Schooner Peggy, supra*),[23] the issue presented here is unquestionably one of "great national concern" (*Bradley* v. *Richmond School Board, supra*, 416 U.S. at 719, quoting *The Schooner Peggy, supra*, 5 U.S. (1 Cranch) at 110). That national significance militates in favor of the applicability of the congressionally prescribed rule of law in effect at the time of the decision on review, even at the expense of "the vested rights of * * * citizens." *The Schooner Peggy, supra*, 5 U.S. (1 Cranch) at 110. In any event, as we show below, application of Section 306 (a) to the present case affects no vested right of Kaiser.

2. *The Nature of the Rights Affected.* In *Bradley*, the Court explained (416 U.S. at 720) that the second aspect of its concern that injustice might arise from retrospective application of a change in law relates to the *nature* of the rights that would be affected by the change: "The Court has refused to apply an intervening change to a pending action where it has con-

[23] Not only were the claimants of the schooner private parties, each of the officers on board the United States vessel at the time it seized the schooner had a private interest in a share of the prize money if the vessel ultimately were condemned (5 U.S. (1 Cranch) at 104).

cluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional."

The defense of illegality, however, does not assert a vested private right. As a party to an illegal contract seeking to avoid its obligation, Kaiser is acting in its capacity as co-conspirator, rather than victim. As this Court repeatedly has noted, the defense of illegality in such a situation "is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions." *Kelly* v. *Kosuga*, *supra*, 358 U.S. at 519, quoting *McMullen* v. *Hoffman*, 174 U.S. 639, 669 (1899). A party who signs a contract with an intent to plead its illegality after receiving its benefits thus does so at the risk that the legislative perception of the public interest might change. "No person has a vested right to be permitted to evade contracts which he has illegally made." *McNair* v. *Knott*, 302 U.S. 369, 373 (1937) (footnote omitted) (holding that Congress could, retroactively, render legal a contract illegal when entered into, thereby precluding the contracting party from obtaining judicial annulment of the contract); accord, *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 431 n.9 (1934); *West Side Belt R.R.* v. *Pittsburgh Construction Co.*, 219 U.S. 92, 104 (1911); *Gross* v. *United States Mortgage Co.*, 108 U.S. 477, 488-489 (1883); *Ewell* v. *Daggs*, 108 U.S. 143, 148-151 (1883). See also *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976).

3. *Nature of the Impact of the Change in Law.* Finally, the application of Section 306(a) to this case imposes no unforeseeable liability on Kaiser.[24] Kaiser

[24] The Court's "third concern has to do with the nature of the impact of the change in law upon existing rights, or, to state it another way, stems from the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard" (*Bradley* v. *Richmond School Board*, *supra*, 416 U.S. at 720).

all along has known that it is a party to a contract that imposes on it the very obligations that it is now attempting to avoid. Moreover, when Kaiser became subject to the present purchase-of-coal clause in 1974, application to the coal producers of the previous purchase-of-coal clause, which required the payment of 40¢ per ton on produced coal and 80¢ per ton on purchased coal (see note 3, *supra*) had been upheld by the NLRB, *United Mine Workers of America* (*Dixie Mining Co.*), 188 N.L.R.B. 753 (1971), appeals dismissed on other grounds, 468 F.2d 1139 (D.C. Cir. 1972).[25] Accordingly, the possibility that Kaiser would be held liable on the present clause was hardly "new and unanticipated" (*Bradley* v. *Richmond School Board*, *supra*, 416 U.S. at 720).[26]

---

[25] The fact that a subsequent court decision invalidated the 80¢/40¢ "penalty" clause, *Riverton Coal Co.* v. *UMWA*, 453 F.2d 1035, 1040-1041 (6th Cir.), cert. denied, 407 U.S. 915 (1972), hardly detracted from the possibility that Kaiser would be held liable under the present purchase-of-coal clause, which imposes the same charge on purchased coal as on produced coal.

[26] Moreover, alternative remedies may be, or at least at one time were, available to Kaiser. First, Kaiser may be entitled to bring an antitrust action against the UMW for damages trebling the amount of its contributions to the funds under the purchase-of-coal clause. See *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 138-140 (1968). But see *Consolidated Express, Inc.* v. *New York Shipping Association*, 602 F.2d 494, 519-521 (3d Cir. 1979), vacated and remanded on other grounds, 448 U.S. 902 (1980) (recognizing a limited exemption to treble damage liability under the antitrust laws where the defendant can prove, *inter alia*, that at the time it entered into the challenged agreement it could not reasonably have foreseen that it would be held unlawful under 29 U.S.C. 158(b)(4) or (e) and, hence, not exempt from scrutiny under the antitrust laws).

An alternative remedy for the alleged Section 8(e) violation may not be available at this late date (except to the extent that a Section 8(e) violation may subject the provision to scrutiny under the antitrust laws; see *Connell Construction Co.* v. *Plumbers Local No. 100*, 421 U.S. 616 (1975)). However, Kaiser could have refused to sign the agreement at the outset, and 29 U.S.C. 187 would have afforded it a damage remedy against the Union if the

II. UNDER APPLICABLE LAW, THE TRUSTEES ARE ENTITLED TO ATTORNEYS' FEES

For the reasons stated in Part I(B) above, as well as those discussed below, we submit that the award of attorneys' fees to the trustees should be upheld under Section 306(b) of the 1980 Amendments, 94 Stat. 1295.

Section 306(b), 94 Stat. 1295, unequivocally provides for the award of attorneys' fees to a prevailing fiduciary in an action commenced subsequent to enactment of the 1980 Amendments. As is true of Section 306(a), previously discussed, neither the language of Section 306(b) nor its legislative history contains any suggestion that it was not meant to apply to cases that were pending on the date of its enactment.

Congress intended the attorneys' fees provision of Section 306(b) not as a punitive measure, but rather as a means of furthering the important national policy of protecting the financial soundness of employee benefit plans (see, *e.g.*, 126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) (remarks of Rep. Thompson); *id.* at S11673 (remarks of Sen. Williams)), a policy enunciated in the original ERISA enactment (see 29 U.S.C. 1001). Applying the amendment to pending cases would promote that

---

Union had struck to compel execution of the agreement and if the purchase-of-coal clause were found to be a "hot cargo" provision. Finally, Kaiser could have filed an unfair labor practice charge, subject, of course, to the NLRB General Counsel's determination of whether an unfair labor practice complaint should issue.

In any event, since, as we have shown, Kaiser has no vested right to raise the defense of illegality and its liability was foreseeable, it is difficult to see why precluding it from raising the illegality defenses, concerning its own contractual undertaking, would be "manifestly unjust."

Finally, we note that preclusion of the antitrust and Section 8(e) defenses in this context will not affect the prospective forms of relief that are available under those statutes. Indeed, a holding to the effect that employers may not raise such defenses in these circumstances would furnish an incentive to employers to litigate these issues directly—thereby vindicating the antitrust and labor law policies they serve—before significant liabilities accrue.

salutary policy. Nor would it create any injustice, "manifest" or otherwise. Because fees are awarded only to *prevailing* fiduciaries, the question is simply one of allocating the costs of that litigation between an employer and the corpus of a pension and welfare trust fund for its employees, former employees, and their beneficiaries, from which the employer has been found to have wrongfully withheld agreed-upon contributions. Accordingly, there is no less reason here than in *Bradley* v. *Richmond School Board*, *supra*, to apply the newly enunciated congressional policy concerning attorneys' fee awards, in furtherance of the important public interest Congress sought to advance.

CONCLUSION

The judgment of the court of appeals should be affirmed.[27]

Respectfully submitted.

REX E. LEE
Solicitor General
WILLIAM F. BAXTER
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
BARBARA E. ETKIND
Assistant to the Solicitor General
ROBERT B. NICHOLSON
ROBERT J. WIGGERS
Attorneys

T. TIMOTHY RYAN, JR.
Solicitor of Labor
Department of Labor
WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board
AUGUST 1981

---

[27] In our view, whether Kaiser could have raised an antitrust illegality defense or a Section 8(e) illegality defense under the law prevailing prior to the enactment of the 1980 Amendments is a closer question than whether it can do so at the present time. Because, for the reasons we have discussed, the 1980 Amendments are retrospectively applicable to all aspects of this case and require affirmance of the judgment, we submit that the Court need not reach that question or the question whether, under prior law, the trustees would have been entitled to attorneys' fees if they had prevailed.

APPENDIX A

Section 306(a) of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1295 (the "1980 Amendments") adds a new Section 515 to ERISA, which provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Section 306(b) of the 1980 Amendments, 94 Stat. 1295, adds Section 502(g)(2) to ERISA, which provides:

> (2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan—
>
> (A) the unpaid contributions,
> (B) interest on the unpaid contributions,
> (C) an amount equal to the greater of—
> (i) interest on the unpaid contributions, or
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
> (E) such other legal or equitable relief as the court deems appropriate.

> For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or if none, the rate prescribed under Section 6621 of the Internal Revenue Code of 1954.

Section 108(c)(1) of the 1980 Amendments, 94 Stat. 1267, provides in relevant part that "the amendments to this Act made by the Multiemployer Pension Plan Amendments Act of 1980 shall take effect on the date of enactment of that Act."

A prior version of Section 306, which is discussed in the legislative history section of our brief (at pages 20-21), Section 308 of S. 1076, 96th Cong., 1st Sess. (1979) (*reprinted in* Staff of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *The Multiemployer Pension Plan Amendments Act of 1980, S. 1076: Summary and Analysis of Consideration* 242-243 (Comm. Print 1980)) provided:

> (a) Part 5 of subtitle (B) of title I is amended by adding after section 514 the following new section:
>
> "Sec. 515. Every employer who is obligated under the terms of a collectively bargained multiemployer plan (or under the terms of a collective bargaining agreement related to the plan) shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement."
>
> (b) Section 502 is amended by—
>
> (1) redesignating subsection (b)(1) and (2) as subsection (b)(1)(A) and (B), and adding a new paragraph 2, to read as follows:
>
> "(2) The Secretary shall not initiate an action to enforce section 515.";

(2) redesignating subsection (g) as paragraph (1) of such subsection and inserting "(other than an action described in paragraph (2))" between "title" and "by" in such redesignated paragraph (1), and adding a new paragraph (2), to read as follows:

"(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan the unpaid contributions, interest on the unpaid contributions, and [an] additional amount equal to interest on the contributions as liquidated damages, a reasonable attorney's fee and costs of the action, to be paid by the defendant, as well as such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions is determined using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954, as amended."

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 353481 608